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No. 93-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

WILLIAM DUNN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD FRANCIS DONOVAN
Counsel of Record
ANNE E. COHEN
JONATHAN E. RICHMAN
SANDRA L. COBDEN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000
Counsel for Petitioner
Owens-Corning Fiberglas
Corporation

October 25, 1993

QUESTIONS PRESENTED

1. Do additional awards of punitive damages in mass-tort litigation become unconstitutionally excessive under the Due Process Clause where the defendant's overall liability for compensatory damages and other expenses (including other punitive-damages awards) will itself suffice to inflict whatever punishment and deterrence might be necessary -- and where further punitive-damages awards could jeopardize future plaintiffs' ability to obtain compensation for their injuries?

2. Do additional awards of punitive damages in mass-tort litigation violate the Due Process Clause where the defendant is being punished repeatedly and without limitation for a single course of conduct?

3. Do additional awards of punitive damages in mass-tort litigation violate the Due Process Clause where punitive damages are no longer needed to punish and deter the defendant *and* where they constitute repetitive and unlimited punishment for the same course of conduct?

LIST OF PARTIES AND RULE 29.1 STATEMENT

Petitioner Owens-Corning Fiberglas Corporation was the defendant in the United States District Court for the District of the Virgin Islands and the appellant in the United States Court of Appeals for the Third Circuit. Respondent William Dunn was the plaintiff in the District Court and the appellee in the Court of Appeals.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has no subsidiaries other than wholly owned subsidiaries.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 93-____

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

WILLIAM DUNN,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Owens-Corning Fiberglas Corporation ("Owens-Corning") respectfully petitions this Court to grant a writ of

certiorari to review the judgment of the *in banc* Court of Appeals for the Third Circuit, filed July 27, 1993.

OPINION BELOW

The Court of Appeals' *in banc* opinion is reported at 1 F.3d 1371 (3d Cir. 1993), and is reprinted in the appendix at 1a-85a. The district court's opinion is reported at 774 F. Supp. 929 (D.V.I. 1991), and is reprinted in the appendix at 86a-128a.

JURISDICTION

The judgment of the *in banc* Court of Appeals was entered on July 27, 1993. This petition has been filed within 90 days of that ruling. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment.

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Due Process Clause of the Fifth Amendment to the United States Constitution, reprinted at 133a.

STATEMENT OF THE CASE

This petition seeks review of a $1 million punitive-damages judgment against Owens-Corning for its sale and manufacture of asbestos-containing products 20 to 40 years ago. Based on those decades-old activities, Owens-Corning now faces an *uninsured*

liability of about $1 billion as well as 29 punitive-damages judgments totalling more than $56 million to date.

Owens-Corning is just one of the many defendants in the nationwide asbestos litigation, which presents "an unparalleled situation in American tort law." *In re School Asbestos Litig.*, 789 F.2d 996, 1000 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). The litigation involves hundreds of thousands of claims, tens of billions of dollars, numerous bankruptcies and insolvencies, and a risk that the defendants' funds might run out before many injured plaintiffs can receive compensation.

Particularly in this context, but in other mass-tort litigations as well, serious questions arise about the continued availability of punitive damages. Punitive damages are not needed to punish or deter -- because the staggering liability for compensatory damages and other expenses fulfills those purposes, and the alleged misconduct ended many years ago. Punitive damages also inflict multiple and unlimited punishment for the same course of conduct, in violation of due-process principles. In addition, "the unrestricted and simultaneous payment of punitive damages and compensatory damages will inevitably bankrupt all of the defendants in the asbestos litigation" and may deprive future deserving plaintiffs of compensation. *Abate v. ACandS, Inc.*, No. 89236704, slip op. at 23 (Baltimore Cir. Ct. Dec. 9, 1992), *reprinted in* Mealey's Litig. Reports - Asbestos ("Mealey's"), Dec. 18, 1992, at C-1, C-12.

A. The Asbestos Litigation Crisis

The asbestos litigation is the ultimate example of mass-tort litigation. More than 250,000 asbestos-related personal-injury claims have been filed to date, *see* Stefan Fatsis, *Asbestos Scourge: New Attitude, Less Removal, Perennial Litigation*, Associated Press, Aug. 24, 1993, and some 160,000 claims now are pending in the federal and state courts [43a].[1] According to one estimate cited by the Third Circuit dissenters, more than 668,000 new claims will be filed between 1990 and 2049. [43a.]

The expenses associated with the asbestos litigation have been astronomical. One report estimated that asbestos defendants had paid $7 billion by early 1991 and ultimately could spend as much as $50 to $100 billion. Suzanne L. Oliver & Leslie Spencer, *Who Will the Monster Devour Next?*, Forbes Magazine, Feb. 18, 1991, at 75, 79. Others have put the costs at $12 to $20 billion to date. Ruth Gastel, *Occupational Disease: Insurance Issues*, Insurance Information Institute Reports, May 1993; Stuart E.

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1. Between 1986 and June 30, 1993, over 65,000 new cases were filed in federal courts alone. *See* Judicial Admin. Office, *Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit During the 12 Month Periods Ended June 30, 1988 Through 1992* and *Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit During the 12 Month Periods Ended June 30, 1992 and 1993*; *see also In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 745 (E. & S.D.N.Y. 1991) ("*Findley v. Blinken*"), *vacated*, 982 F.2d 721 (2d Cir. 1992), *on rehearing*, 993 F.2d 7 (2d Cir. 1993).

   Knowledgeable commentators have estimated the current number of state-court suits to be twice the number of federal-court filings. *See* Deborah R. Hensler, *Fashioning a National Resolution of Asbestos Personal Injury Litigation: A Reply to Professor Brickman*, 13 Cardozo L. Rev. 1967, 1970 & n.6 (1992).

Rickerson, *How the Asbestos Litigation Problem Can Be Solved*, Corporate Legal Times, Mar. 1993, at 10.

These costs have had a catastrophic impact on many asbestos defendants. At least 15 former manufacturers or distributors of asbestos-containing products -- representing more than 50% of the historical liability in asbestos personal-injury cases -- have sought bankruptcy protection because of asbestos claims, and others are experiencing such financial difficulties that they cannot pay their historical liability shares.[2] The bankruptcy and financial instability of so many principal defendants have put increasingly greater pressure on solvent defendants to pay more than their historical liability shares under principles of joint and several liability. *See, e.g., Defendant's Annual Filings Provide New Info on Litigation -- Fibreboard*, Mealey's, Apr. 5, 1991, at 35 (in one trial, Fibreboard's verdict was increased by about $65.4 million because of Celotex's bankruptcy); Motley & Rice, *supra*, at 25.[3]

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2. *See Findley v. Blinken*, 129 B.R. at 747; State Judges Asbestos Litig. Comm., *Megatorts: The Lessons of Asbestos Litigation*, July 21, 1992, *reprinted in* Mealey's, Nov. 20, 1992, at B-1, B-2; Ronald L. Motley & Joseph F. Rice, *The Carlough Settlement -- Blueprint for a Sane Resolution to the Asbestos Problem*, Mealey's, July 1, 1993, at 24, 25; *see also Keene Corp. v. Fiorelli*, No. CV 93-2129, 1993 U.S. Dist. Lexis 10700 (E. & S.D.N.Y. July 1, 1993) (granting Keene's petition for limited-fund status and provisionally certifying a limited-fund class), *injunction stayed*, No. 93-2129 (2d Cir. Aug. 10, 1993).

3. The following numbers can only suggest the asbestos litigation's impact on several asbestos companies. **Johns-Manville Corporation:** 17,000 claims pending, and 35,000 more expected, with total value of more than $1 billion, when Manville filed for bankruptcy in 1982; more than 170,000 new claims actually filed against the Manville Trust by February 1991; 47,000 more claims expected; Trust's assets valued in 1991 at

(continued...)

The profusion of asbestos cases also has taxed judicial resources. The Ad Hoc Committee on Asbestos Litigation appointed by the Chief Justice found that federal asbestos cases in 1990 constituted more than six percent of all civil filings, and it concluded that "the large volume of asbestos cases, both in federal and state courts, and the resulting delays and costs, have resulted in a denial of justice and fundamental fairness to litigants." Ad Hoc Committee on Asbestos Litigation, *Reports of the Proceedings of the Judicial Conference of the United States* 33 (1991). Similarly, in 1991, the federal Judicial Panel on Multi-District Litigation transferred virtually all federal asbestos cases to a single district court -- despite its previous refusals to do so -- because "this litigation has reached a magnitude . . . that threatens the administration of justice." *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415, 418 (J.P.M.L. 1991).

The continued availability of punitive damages has greatly exacerbated these problems in several ways.

First, from a plaintiff's perspective, punitive damages are a windfall. Their availability thus encourages plaintiffs to proceed to trial in the hope of receiving large awards, and these additional trials congest court dockets and increase litigation costs for all

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3.(...continued)

$2.1 to $2.7 billion; asbestos liabilities valued at $6.5 billion. *Findley v. Blinken*, 129 B.R. at 751-65.

Keene Corporation: 190,000 personal-injury claims since 1977; 98,000 claims pending as of 1993; 170,000 new claims expected; indemnity and defense expenditures of $447 million as of 1993; projected total liability of $681.1 million for pending and future claims; net assets of $51.4 million. *Keene v. Fiorelli, supra*, 1993 U.S. Dist. Lexis 10700 at *20-26.

parties -- as well as for non-asbestos litigants. *See* Judge William W. Schwarzer, ***Punishment Ad Absurdum***, Cal. Law., Oct. 1991, at 116; *see also* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1868 (1992) (plaintiffs' attorneys "are far more likely to litigate these cases when the potential for punitive damages exists").

Second, punitive damages lead to more lawsuits. "[T]he largest percentage of claimants exhibit only minor asbestos-related injury and often have no measurable impairment or disability at the time they file their cause of action." *In re Asbestos Cases*, 224 Ill. App. 3d 292, 586 N.E.2d 521, 523 (1st Dist. 1991); *see also* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541, 549 (1992) (studies estimate that 25% to 75% of all claimants are unimpaired). These unimpaired claimants often cannot hope to recover significant compensatory damages, but the potential for obtaining punitive damages makes a lawsuit much more attractive and boosts the settlement value of claims, thereby diverting defendants' diminishing resources to persons who are not even injured. [51a (Weis, J., dissenting) (punitive damages are "a weighty factor in settlement negotiations and inevitably result[] in a larger settlement agreement than would ordinarily be obtained").] *See* Oliver & Spencer, *supra*, at 79 (punitive damages are "a very powerful weapon used by the plaintiffs' lawyers to persuade companies to settle").[4]

4. The fact that punitive damages are obtainable in many jurisdictions under a simple preponderance-of-the-evidence standard makes them even more of a threat than they otherwise might be.

Third, and perhaps most importantly, awards of punitive damages in addition to staggering compensatory liability increase the drain on asbestos and other mass-tort defendants' resources and can deprive future claimants of compensation. *See, e.g., Abate, supra*, slip op. at 24, Mealey's, Dec. 18, 1992, at C-12 ("simultaneous payment of punitive damages and compensatory damages will hurt crucially those claimants who are found to be entitled to compensation in the future"). "To permit the first plaintiffs to receive punitive damages when later plaintiffs have yet to come to trial seems foolish and unfair." Judge William W. Schwarzer, *supra*, at 116; *accord Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1055 ("*Juzwin I*") ("priority should be given to compensating those who have been injured rather than conferring windfalls on those who have already been compensated"), *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989) ("*Juzwin II*").

B. Owens-Corning's Situation

Virtually all asbestos-related claims against Owens-Corning arise from its sale and manufacture of Kaylo, an asbestos-containing insulation product that the company began to sell in 1953 and began to manufacture in 1958. Owens-Corning stopped making that product in 1972, and all sales ended in 1973. [JA 1941-42.[5]] During the entire period between 1953 and 1973, total Kaylo sales amounted to about $140 million, and total Kaylo profits were about $1.4 to $7.7 million. [35a n.24, 50a.]

By May 31, 1991, when Owens-Corning filed its post-trial motions in this case, it had received 148,780 asbestos-related

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5. "JA" refers to the Joint Appendix submitted to the Third Circuit.

personal-injury claims in all 50 states, the District of Columbia, Guam and the Virgin Islands. [JA 1942.] By the end of 1992, Owens-Corning had received a total of 186,000 claims. *See More Annual Filings Detailed*, Mealey's, June 18, 1993, at 12 ("1992 Annual Report"). New case receipts have exceeded 20,000 per year for the past six years. *See* JA 1943; 1992 Annual Report.

By May 31, 1991, Owens-Corning had resolved (*i.e.*, paid) 62,588 claims, and another 86,192 were pending. [JA 1942.] By the end of 1992, the company had resolved about 101,100 claims, but 85,000 still were pending. *See* 1992 Annual Report. In 1990 through 1992 alone, Owens-Corning resolved 54,800 claims for $539 million in indemnity costs -- an average of about $10,000 per claim -- and agreed in principle to settle another 22,800 cases, with payments for those claims in future years expected to be higher than the 1990-1992 average. *Id.*

At the end of 1990, Owens-Corning had $1.26 billion in unexhausted product-liability insurance coverage (including $230 million in deductibles) applicable to asbestos personal-injury claims. [JA 2007.] By the end of 1992, the unexhausted insurance had decreased to $675 million (excluding deductibles). Of this amount, at least as much as $230 million already had been committed to the 22,800 claims settled in principle at higher than recent historical averages, leaving only about $400 million in uncommitted product-liability insurance for new claim resolutions. *See* 1992 Annual Report. If the recent historical average of almost $10,000 per claim continues, the remaining uncommitted insurance will not cover the 62,500 claims pending and unsettled at the end of 1992 -- not to mention future claims or defense costs.

To cover the estimated *uninsured* costs of pending and additional claims through 1999, Owens-Corning established an unfunded, non-cash reserve valued at $950 million as of the end of 1992. [34a n.23.] *See* 1992 Annual Report. Of this amount, $824 million had been charged against 1991 earnings. *See Defendants Reveal Litigation Costs in Annual Filings*, Mealey's, May 1, 1992, at 14. Owens-Corning thus expects to spend about $1 billion of its own money for claims through 1999 -- in addition to the more than $2 billion its insurers will pay. Claims filed in the next century will require additional, uninsured expenditures.

Owens-Corning also has faced a growing number of punitive-damages awards. As of the end of May 1991, 11 awards totalling $19,950,000 in punitive damages had been entered against the company. [JA 1943-48.] As of today, 29 punitive-damages judgments have been entered, totalling $56,060,200 (including the $1 million judgment in this case). [134a-140a.]

C. The Proceedings Below

Respondent William Dunn sued Owens-Corning and other asbestos manufacturers in 1987 under V.I. Code Ann. tit. 4, § 32(a), claiming he had developed asbestosis from his exposure to various asbestos-containing products during his employment. He alleged he had lost weight, was often short of breath and could no longer enjoy his former athletic endeavors because of his asbestosis -- although medical records prepared in conjunction with his orthoscopic knee surgery in 1990 showed that Dunn continued to participate in numerous sports activities, including running, rowing, swimming and weight-lifting.

Despite substantial evidence demonstrating that Dunn was not disabled, the jury awarded him $1.3 million in compensatory damages and $25 million in punitive damages. The district court denied Owens-Corning's post-trial motions but remitted the compensatory damages to $500,000 and the punitive damages to $2 million. [86a-128a.]

On appeal to the Court of Appeals for the Third Circuit, a majority of the panel further remitted the punitive-damages award to $1 million but otherwise affirmed the judgment. Judge Weis dissented, arguing that further awards of punitive damages should be prohibited because they violate Owens-Corning's due-process rights and threaten to deprive future claimants of relief. *Dunn v. HOVIC*, Prod. Liab. Rep. (CCH) ¶ 13,375 (3d Cir. Sept. 18, 1992). After Owens-Corning sought rehearing, the Third Circuit vacated the panel's judgment and granted rehearing *in banc*. [131a-132a.]

A majority of the *in banc* court acknowledged Judge Weis's "powerful dissent" [31a] but concluded that the punitive-damages award did not violate the Due Process Clause based on Owens-Corning's individual circumstances.[6] The majority stated that any attempted solution to the asbestos litigation crisis would be arbitrary and inadequate because the court could not fashion an effective national response [26a-27a]; it also deemed "a judicial opinion of an intermediate court" an inappropriate forum to resolve the issues in light of this Court's silence and congressional inaction [31a]. However, the court further remitted the punitive-damages award to

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6. The majority also held that the award did not violate Virgin Islands law, but this petition does not raise that issue. Nor does the petition question whether Owens-Corning's conduct could support an award of punitive damages.

$1 million because it believed the district court had not sufficiently considered the effect of successive awards in similar asbestos cases. [37a.]

In a dissent joined by four other judges, Judge Weis noted the "burgeoning litigation, corporate collapse, and future compensatory inadequacy" and determined that further awards of punitive damages violate due process because they are repetitive and disproportionate. [45a, 57a.] Focusing on a number of factors -- including (*i*) the repetitive and unlimited punishment for the same course of conduct, (*ii*) the enormous overall liability that Owens-Corning will bear, (*iii*) the total obliteration of all profits from the alleged misconduct, (*iv*) the potential threat to current and future claimants' ability to recover compensatory damages and (*v*) "the adverse effect on settlement of pending claims" [56a-66a] -- the dissenters concluded that "[t]he amounts awarded in prior litigation have been more than adequate to meet the needs of punishment and deterrence" and that an additional award "serves no rational purpose" [66a].

Judge Becker, who joined Judge Weis's opinion on the due-process issue, observed in a separate dissent that "the repetitive imposition of punitive damages upon Owens-Corning for failure to warn in connection with the same series of acts (the sale of asbestos products) has, in terms of the legal justification for punitive damages, become so irrational as to offend the due process clause." [67a.]

REASONS FOR GRANTING THE WRIT

This petition squarely presents this Court with the opportunity to resolve an issue it has never yet addressed: the due-process implications of multiple awards of punitive damages in mass-tort litigation, and especially in asbestos cases. A majority of this Court has now recognized that due-process principles impose substantive limits on punitive damages. *See Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1045 (1991); *see also TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993) (plurality opinion); *id.* at 2731-34 (O'Connor, J., dissenting). The question here is whether additional punitive damages unconstitutionally exceed those limits where (*i*) they no longer are needed to achieve the goals of punishment and deterrence because of the enormous, uninsured compensatory liability arising from hundreds of thousands of mass-tort claims, (*ii*) each new award constitutes repetitive and unlimited punishment for the same acts and (*iii*) additional punitive damages divert funds needed to compensate future plaintiffs for their injuries. Owens-Corning submits that, under these circumstances, punitive damages do not serve any rational purpose and are simply overkill, in violation of the Due Process Clause.

The need for this Court's intervention is critical. Lower courts have long recognized the due-process concerns raised here, but they have felt powerless to address those issues on a case-by-case, jurisdiction-by-jurisdiction basis in light of their national scope. As the sole judicial tribunal with nationwide jurisdiction, only this Court can resolve this crisis by establishing and imposing meaningful due-process guidelines governing asbestos cases and other mass-tort litigations.

I.

Continued Awards of Punitive Damages Violate Due Process Where They Are Not Needed To Punish or Deter, and Where They Inflict Unlimited and Repetitive Punishment for a Single Course of Conduct.

A. Due Process Is Violated Where Additional Punitive Damages Are No Longer Needed To Punish or Deter.

Punitive damages are "a windfall to a fully compensated plaintiff." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Such damages "by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct." *Id.* at 266-67.

As a majority of this Court confirmed in *Haslip* and *TXO*, these twin purposes -- punishment and deterrence -- impose substantive due-process limits on awards of punitive damages. *See Haslip*, 111 S. Ct. at 1045 (punitive damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"); *see also TXO*, 113 S. Ct. at 2718 (plurality opinion) ("the Due Process Clause . . . imposes substantive limits 'beyond which penalties may not go'"); *id.* at 2731-34 (O'Connor, J., dissenting).[7]

This case presents a scenario not raised in either *Haslip* or *TXO*: mass-tort litigation, and the asbestos litigation in particular,

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7. *See also Morgan v. Woessner*, 997 F.2d 1244, 1255-56 (9th Cir. 1993).

where hundreds of thousands of claims have been filed, billions of dollars already have been spent, additional billions will be spent in the future, and the resources of an entire industry are being exhausted. In this particular context, and based on the type of record presented here, additional awards of punitive damages no longer bear any rational relationship to the goals of deterrence and punishment. Those goals already are being achieved through the staggering compensatory costs that defendants such as Owens-Corning must bear, and further awards of punitive damages thus amount to unconstitutionally excessive overkill.

In analyzing whether a punitive-damages award is excessive, this Court and others have considered a variety of factors, including (*i*) "the 'impact upon the parties'" and "the 'financial position' of the defendant," (*ii*) "the profitability . . . of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss," (*iii*) "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation," (*iv*) "the 'desirability of discouraging others from similar conduct'" and (*v*) "'the impact on innocent third parties.'" *Haslip*, 111 S. Ct. at 1044-45.[8] These factors demonstrate the superfluity and excessiveness of additional punitive damages in mass-tort contexts such as this one.

First, additional punitive damages are no longer needed to punish a defendant or to affect its finances where compensatory

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8. *See also Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1417-18 (4th Cir. 1992); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991); *Fischer v. Johns-Manville Corp.*, 103 N.J. 643, 512 A.2d 466, 481-82 (1986); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901-02 (Tenn. 1992); *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897, 908-10 (1991); Restatement (Second) of Torts § 908.

damages alone will serve those purposes. In Owens-Corning's case, almost 200,000 asbestos personal-injury claims already have been filed against the company, with more than 20,000 new claims arriving each year and no end in sight. Owens-Corning already has resolved more than 101,000 claims (for more than $1 billion in indemnity costs); its product-liability insurance is almost entirely committed or exhausted; and it expects to pay almost $1 billion of its own funds to cover the *uninsured* costs of pending and future personal-injury claims through 1999 -- not counting additional claims that might be filed in the next century. Moreover, as other asbestos defendants have become insolvent or financially unstable, Owens-Corning has had to pay an increasingly larger share of compensatory damage awards under principles of joint and several liability. Under these circumstances, as the five dissenting judges stated, "the avalanche of compensatory claims . . . has surely served as more of a punishment and deterrent than individual punitive assessments in isolated cases against manufacturers of other types of products." [49a.] *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967) (Friendly, J.) (noting risk of "overkill" in mass-tort context, where "heavy compensatory damages . . . should sufficiently meet the[] objectives" of deterrence and punishment).[9]

Second, additional punitive damages are not needed where -- as here -- a mass-tort defendant's uninsured liability

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9. *See also Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 886, 213 Cal. Rptr. 547, 552 (2d Dist.) ("the objectives of punishment and deterrence appear to be sufficiently met by the enormity of the present and prospective awards of compensatory damages"), *rev. denied* (Cal. 1985); *cf. Mirkin v. Wasserman*, No. S020465, 1993 Cal. Lexis 4451 at *47 (Cal. Sept. 9, 1993) ("the additional deterrent value of punitive damages does not appear to be needed [where] actual damages, alone, represent a potentially crushing liability").

entirely wipes out the profitability of the alleged misconduct and results in an enormous loss. [50a (Weis, J., dissenting).] Owens-Corning's total Kaylo sales over two decades amounted to only about $140 million, and profits were only about $1.4 to $7.7 million. The company's uninsured billion-dollar liability thus is approximately *seven times* its total sales and *125 to 700 times* its total profits from asbestos-containing Kaylo.

Third, additional punitive damages are not needed where other such damages have been awarded. In Owens-Corning's case, 29 judgments totalling $56,060,200 already have been entered (including this one). Even without the $1 billion in uninsured liability, these judgments would have to be taken in mitigation and would themselves constitute sufficient punishment and deterrence.[10]

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10. That Owens-Corning so far has paid only a portion of those judgments is not dispositive. In 1993 alone, Owens-Corning paid $4,380,000 in punitive-damages judgments [134a], not including the $1 million it paid in this case after the Third Circuit's mandate issued. Owens-Corning also has paid additional amounts (approximately $3 million to date) in various post-judgment settlements of punitive-damages awards. Another 18 judgments totalling $44,185,200 are still on appeal or otherwise unresolved, and additional payments probably will be required. [134a-140a.] *Cf.* Restatement (Second) of Torts § 908, comment e ("It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future").

The *in banc* majority's unwillingness to consider the punitive-damages components of Owens-Corning's post-judgment settlements [33a-34a] is perplexing: but for those pre-existing judgments, Owens-Corning would not have had any reason to pay the plaintiffs a premium in addition to their full compensatory damages.

Fourth, additional punitive damages are not needed where the alleged misconduct has long since ended. Owens-Corning stopped making and selling its asbestos-containing product 20 years ago, as did most other manufacturers of friable asbestos products. Thus, "[i]n asbestos cases, the imposition of punitive damages would not further the deterrent function since the manufacturers no longer use asbestos in their products." *Anstine v. ACandS, Inc.*, No. 3368-1 S 1984, slip op. at 4 (Pa. Ct. of Common Pleas, Dauphin County, Jan. 13, 1989).[11] Moreover, the business community and the public at large already know about the numerous asbestos-related bankruptcies and the tens of billions of dollars in indemnity costs that Owens-Corning and other asbestos defendants have incurred and will continue to incur. *See, e.g.*, Oliver & Spencer, *supra*, at 75. In light of this extensive publicity, it is inconceivable that the continued imposition of punitive damages on mass-tort defendants such as Owens-Corning would make other potential tortfeasors more careful or responsible than they otherwise would be.

Fifth, an excessiveness analysis in the mass-tort context should not ignore the impact of additional punitive damages on "'innocent third parties,'" *Haslip*, 111 S. Ct. at 1044, such as other personal-injury claimants. As five Fifth Circuit judges concluded eight years ago, "[t]here is a real and present danger that [asbestos defendants'] available assets will be exhausted before those later

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11. *See also Drayton v. Jiffee Chem. Corp.*, 395 F. Supp. 1081, 1098 (N.D. Ohio 1975) ("there would seem to be little deterrent value in inflicting punitive damages" where "many [competing products] presently on the market are uniformly characterized by safer formulation"), *modified on other grounds and aff'd*, 591 F.2d 352 (6th Cir. 1978); *Magallanes*, 167 Cal. App. 3d at 886, 213 Cal. Rptr. at 552 ("the objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace").

victims can seek the compensation to which they are entitled." *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1330 (5th Cir. 1985) (*en banc*) (Clark, C.J., dissenting); *accord Findley v. Blinken*, 129 B.R. at 751 ("there is not enough money available from traditional defendants to pay for current and future claims"); *Abate v. ACandS, Inc.*, *supra*, slip op. at 26, Mealey's, Dec. 18, 1992, at C-13 (deferring payment of punitive damages in about 8,500 Baltimore asbestos cases "until all compensatory damages have been paid," because "unless the payment of punitive damages is deferred, future deserving plaintiffs will be unable to collect even compensatory damages"). Courts should not further jeopardize future claimants' ability to obtain compensation for their injuries by granting windfall punitive damages to earlier claimants who already have been fully compensated. [54a-56a (Weis, J., dissenting).]

The *in banc* majority dismissed this consideration by claiming that Owens-Corning had not shown it would be unable to pay future awards. [34a.] But that conclusion -- which in any event was predicated on mistaken and outdated assumptions about the company's reserves and insurance[12] -- misses the point.

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12. The majority incorrectly relied on Owens-Corning's $950 million asbestos reserve as "a further indication of the company's ability to pay" [34a n.23]. That reserve, however, is an unfunded, non-cash reserve; there is no money in the bank. The reserve is simply a balance-sheet entry reflecting an ascertainable future liability, and it must be funded through the company's future earnings. If those earnings are diverted to paying windfall punitive damages, money might not be available to pay compensatory damages.

The existence of this reserve for the *uninsured* $1 billion cost of asbestos claims through 1999 renders the majority's discussion of Owens-Corning's insurance essentially superfluous. Moreover, the $1.26 billion and $1.13 billion insurance figures the majority cited [34a & n.23] are now out of date. As shown above, Owens-Corning had only about $675

(continued...)

Punitive damages are intended only to sting a defendant, not to destroy it. *E.g.*, *Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992) ("award should not be so high as to result in the financial ruin of the defendant").[13] Even a solvent company can devote only finite resources to paying personal-injury claims while still conducting its business -- and Owens-Corning already expects to pay about $1 billion for *uninsured* claims through 1999. As the five dissenters realized, "[i]f bankruptcy is the test [of excessiveness], then due process relief will always come too late." [65a.] Moreover, the sole purposes of punitive damages are to punish and deter. If those purposes already are being served by a defendant's overall liability, additional punitive damages should not be imposed merely because the defendant might be able to pay them. Finally, issues about the continued availability of punitive damages in asbestos and other mass-tort cases go beyond Owens-Corning's own current financial condition. If punitive damages continue to be awarded, other defendants can become insolvent, thereby increasing the financial pressures on presently solvent companies such as Owens-Corning.

For all these reasons, serious constitutional questions exist about whether additional punitive damages in mass-tort contexts such as this one still serve their permissible goals of punishment and deterrence. "'[T]o punish the guilty beyond their guilt is not

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12.(...continued)
million in unexhausted product-liability insurance (excluding deductibles) by the end of 1992. And only about $400 million of that amount was uncommitted and still available to resolve pending or new claims.

13. *Accord Arab Termite & Pest Control of Fla. v. Jenkins*, 409 So. 2d 1039, 1043 (Fla. 1982); *Fraidin v. Weitzman*, 93 Md. App. 168, 611 A.2d 1046, 1068-69 (1992), *cert. denied*, 329 Md. 109, 617 A.2d 1055 (1993).

different from punishment of the innocent, and it cannot be done in a manner consistent with ordinary notions of justice.'" [58a (Weis, J., dissenting) (quoting Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 854 (1989)).]

B. Repetitive and Unlimited Awards of Punitive Damages for a Single Course of Conduct Also Violate Due Process.

Apart from being unnecessary to punish or deter, punitive damages in mass-tort litigation can inflict multiple and unlimited punishments for a single course of conduct. Due-process principles prohibit such unconstrained and excessive punishment for the same offense.

> A defendant has a due process right to be protected against unlimited multiple punishment for the same act . . . because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process. Certainly the principle of *res judicata*, the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is part of the process that is due under our constitutional system.

In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated on other grounds*,

693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).[14]

Courts generally have concluded that a defendant's manufacture and/or distribution of an allegedly defective product is a single, continuous course of conduct, regardless of the number of plaintiffs purportedly harmed by those acts. *E.g.*, *In re School Asbestos Litig.*, 789 F.2d at 1003-05; *Juzwin I*, 705 F. Supp. at 1061. And yet, multiple awards of punitive damages continue to be imposed. In Owens-Corning's case, 29 such judgments totalling $56,060,200 already have been entered -- in addition to the billions of dollars in compensatory liability -- all for the company's single course of conduct in making and selling asbestos-containing Kaylo.

As one court has said of asbestos cases, "it is totally unrealistic to suggest that each [punitive damages] award is predicated solely on the conduct of the defendant manufacturer as it relates only to the plaintiff on trial." *Juzwin I*, 705 F. Supp. at 1056. The Due Process Clause does not permit such limitless punishment for the same acts. *See* 62a (Weis, J., dissenting)

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14. *Accord Juzwin II*, 718 F. Supp. at 1234 ("repetitive awards of punitive damages for the same conduct violate a defendant's due process rights"); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *see also Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle"); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting); *Magallanes*, 167 Cal. App. 3d at 888-89, 213 Cal. Rptr. at 554; Judge William W. Schwarzer, *supra*, at 116.

("Basic notions of due process are offended by punishment that occurs over and over again as has happened in asbestos litigation.").[15]

C. The Due-Process Violation Becomes Particularly Egregious Where Punitive Damages Have Exceeded Their Purposes and Still Continue To Be Imposed in Unlimited Amounts for a Single Course of Conduct.

Mass-tort litigation raises especially compelling due-process issues about punitive damages because both types of violations discussed above generally occur. The due-process concerns thus arise not only from punitive damages' excessiveness or from their repetitiveness but from the combination of these two problems. This combination exacerbates the award's unconstitutionality and particularly disturbed the five dissenters [56a-66a, 67a].

The compound problem is endemic to mass-tort litigation -- and is especially severe in the asbestos context. Punitive damages evolved under circumstances very different from those of today's mass-tort litigation: they often were awarded only where the amount of *compensatory* damages was too small to punish the wrongdoer or to deter others, and they usually involved only a single plaintiff (or a few plaintiffs), so that "a punitive recovery by

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15. This case does not necessarily require the Court to rule that only one award of punitive damages may ever be imposed for a single course of conduct under any set of circumstances. In Owens-Corning's situation, 29 judgments totalling more than $56 million already have been entered -- not even counting the company's $1 billion uninsured overall liability. Wherever the Court might choose to draw the due-process line on multiple awards of punitive damages, the aggregate number and amount of awards against Owens-Corning is well past it.

[the plaintiff] ends the matter, except for such additional liability as may be provided by the criminal law." *Roginsky*, 378 F.2d at 838; *see also In re School Asbestos Litig.*, 789 F.2d at 1003-04; John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 141-47 (1986).

Mass-tort cases, however, present a radically different situation. The coalescence of hundreds of thousands of plaintiffs, seemingly endless litigation, ruinous compensatory damages and numerous corporate bankruptcies can itself accomplish the societal goals of punishment and deterrence that punitive damages were designed to achieve in single-victim cases often involving only minimal compensatory damages. In this mass-tort context, additional punitive damages become unnecessary, irrational and unconstitutionally excessive.

Mass-tort litigation -- especially the asbestos litigation -- thus poses unique and particularly serious due-process issues, elevating the excessiveness and repetitiveness problems of punitive damages to levels previously unknown. Those problems have dramatic consequences for the hundreds of thousands of asbestos and other mass-tort litigants, the judicial system, and American industry and society as a whole.

II.

This Court Must Intervene Because the Lower Courts Have Proven Unable To Deal with the Problems of Unnecessary and Repetitive Awards of Punitive Damages in Mass-Tort Litigation.

Mass-tort litigation -- and the asbestos litigation in particular -- has become a nationwide crisis that shows no sign of ending. The longer additional awards of punitive damages remain available, the greater the likelihood that this crisis will worsen: due-process violations will increase, federal and state courts will become even more overwhelmed with personal-injury claims, additional defendants will be forced to seek bankruptcy protection, and future claimants might eventually be left without relief. As the five dissenting judges warned, "it is already late in the day." [54a.]

This Court is the only one in the nation that can resolve these issues. The state courts and lower federal courts will not -- and cannot -- do so.

First, individual courts "perhaps understandably" have treated the problems of punitive damages in mass-tort litigation "in a parochial and near-sighted manner." *In re School Asbestos Litig.*, 789 F.2d at 1001. No court in the nation -- except for this Court -- can control the actions of tribunals in other jurisdictions to ensure that total punitive-damages awards rendered in mass-tort actions throughout the country neither exceed the amount needed to deter and punish nor constitute multiple punishment for the same conduct. Rather, an individual court most likely will not "wish to deny its litigants the benefits that are available in another jurisdiction." *Id.* As Judge Friendly warned,

> we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because [plaintiffs] in California and . . . New York had stripped that cupboard bare, even assuming the defendant would want such a charge, and still more unrealistic to expect that the jury would follow such an instruction or that, if they didn't, the judge would reduce the award . . . .

Roginsky, 378 F.2d at 840. In fact, any attempt by a single court to adopt a far-sighted, global approach to punitive damages actually "is discouraged because other jurisdictions are not required to adopt a similarly enlightened viewpoint. A forum wishing to take the long-range view might find that its efforts were not only ineffective but unfair to its citizenry because claimants in the other states could drain off all the assets available for satisfaction of claims." *In re Asbestos School Litig.*, 789 F.2d at 1001.[16]

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16. *Accord Garnes*, 413 S.E.2d at 905 (West Virginia courts cannot do anything "that will have any impact whatsoever on the set of economic trade-offs that occur in the national economy" because "trying unilaterally to do so will only punish West Virginians without improving the system for anyone else"); *Fischer v. Johns-Manville Corp.*, 512 A.2d at 478 (limits on punitive damages "would be ineffective unless applied uniformly. To adopt such a cap in New Jersey would be to deprive our citizens of punitive damages without the concomitant benefit of assuring the availability of compensatory damages for later plaintiffs. This we decline to do."); Testimony of Justice Richard Neely Before Senate Commerce Committee, Sept. 12, 1991, at 9-10 ("[b]y trying unilaterally to [improve West Virginia's product-liability system], we will succeed only in impoverishing our own state's residents without doing anyone, anywhere, any measurable good"), *cited in* Lester Brickman, *supra*, at 1833 n.52.

Second, in the absence of guidance from this Court, lower courts have refused to tackle the novel and substantial constitutional questions raised here -- and, like the *in banc* majority [32a], even have relied on this Court's previous silence as tacit approval of punitive damages in mass-tort litigation. This reliance is incorrect. Mass-tort issues simply had not arisen in *Haslip*, *TXO* or this Court's other punitive-damages decisions, so the Court had no reason to express any opinion about them. And this Court's denials of certiorari in other cases should not be deemed an expression of the Court's views. The Court now should take this opportunity to rule on the issues -- because no lower court appears willing to do so unless this Court acts first.

Third, a judicial solution to these important national questions is entirely appropriate. Punitive damages in tort cases are a common-law and judicial creation, and due-process issues are the province of the judiciary. The judiciary's insistence on "looking backward to the signposts of *stare decisis*," *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir.) (*en banc*) (Clark, C.J., dissenting), *cert. denied*, 478 U.S. 1022 (1986), and its unwillingness to confront the new problems posed by punitive damages in mass-tort actions have led to the present emergency. As the five Third Circuit dissenters stated, "[m]istakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area." [53a]; *accord* Judge R. Barclay Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 Dick. L. Rev. 265, 301 (1983) (judiciary "can and should address the problems created by the continued use of the judge-made doctrine of punitive damages as it relates to asbestos litigation").

A number of judges throughout the country have called for this Court to address punitive damages in mass-tort litigation -- especially in asbestos cases. Five dissenting members of the *en banc* Fifth Circuit declared in 1986 that this Court "is [the] only one right court to [resolve these problems] . . . . [T]he problems we face in this litigation are ones of national public policy." *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d at 417 (Clark, C.J., dissenting).[17] And in yet another asbestos case, the Fifth Circuit itself recently voiced "misgivings" about prior, binding Circuit law because "'[w]e have the greatest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.'" *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1033 (5th Cir. 1990) (quoting *Roginsky*, 378 F.2d at 839), *cert. denied*, 111 S. Ct. 2236 (1991).

Not only is this Court's resolution of the due-process issues both necessary and appropriate; the Court should address them *now*. As shown above, lower courts have refused to take the initiative even as they have acknowledged the significant policy and constitutional concerns raised here. Any additional delay will only aggravate the crisis in the asbestos litigation and in other mass-tort cases. The time has come to stop the imposition of unnecessary and excessive punishment, the repetitive damage awards for the same course of conduct, and the diversion of funds needed for compensating future plaintiffs -- and to reduce the disincentives to

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17. *Accord Jackson*, 750 F.2d at 1335-36 (Clark, C.J., dissenting); *see also Racich*, 887 F.2d at 399 (constitutional reform of punitive damages in asbestos cases "is best left for Congress or for higher judicial authority"); *Juzwin II*, 718 F. Supp. at 1235 (noting "powerless[ness]" to address due-process issues in asbestos cases "absent uniformity either through legislation or a Supreme Court determination").

settlement and the resulting docket congestion created by the lure of million-dollar punitive-damages awards.

CONCLUSION

The Court therefore should grant Owens-Corning's petition for a writ of certiorari.

Respectfully submitted,

DONALD FRANCIS DONOVAN
(*Counsel of Record*)
ANNE E. COHEN
JONATHAN E. RICHMAN
SANDRA L. COBDEN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for Petitioner
Owens-Corning Fiberglas Corporation

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-3837

WILLIAM DUNN

HESS OIL VIRGIN ISLANDS CORP.

v.

HOVIC; AMERADA HESS CORP.; KEENE CORPORATION

v.

THE LITWIN CORPORATION; LITWIN PANAMERICAN CORP.;
BORINQUEN INSULATION CO.

Owens-Corning Fiberglas Corporation,

Appellant

On Appeal from the
District Court for the Virgin Islands (St. Croix)

(D.C. Civil No. 87-00238)

Argued April 22, 1992

Before: SLOVITER, *Chief Judge*, MANSMANN and WEIS, *Circuit Judges*

Reargued In Banc February 2, 1993

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and WEIS, *Circuit Judges*

Opinion filed: July 27, 1993

Barry S. Simon (Argued)
Paul Mogin
Williams & Connolly
Washington, D.C. 20005
Attorneys for Appellant

Joel H. Holt (Argued)
Christiansted, VI 00820

Paul S. Minor
Minor & Guice
Biloxi, Mississippi 39533
Attorneys for Appellee

OPINION OF THE COURT

SLOVITER, *Chief Judge*.

Preliminary Note

Before us is the appeal of Owens-Corning Fiberglas Corporation (OCF) from the judgment of the district court of the Virgin Islands awarding William Dunn $500,000 in compensatory damages and $2 million in punitive damages. A panel of this court heard argument on OCF's appeal on April 22, 1992 and issued an opinion affirming the compensatory damages award and remitting the punitive damages award to $1 million. Thereafter, the court granted OCF's petition for rehearing in banc, limited to the punitive damages issue. The panel's original opinion on the compensatory damages issue, modified in minor respects to reflect the recent procedural events, is refiled contemporaneously with this opinion.[1]

In its petition for rehearing and at oral argument before the in banc court, OCF directed its argument to its contention that multiple awards of punitive damages in asbestos-related injury cases should be prohibited as a matter of Virgin Islands law or federal due process.

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1. The order granting rehearing in banc vacated the original opinion pursuant to this court's Internal Operating Procedure 9.5.9.

Accordingly, this opinion essentially restates the opinion of the panel on the issues of the sufficiency of the evidence, Dunn's closing argument, and the jury charge, but contains a more extended discussion of OCF's challenge to the excessiveness of punitive damage awards in asbestos cases.

I.

SUFFICIENCY OF THE EVIDENCE FOR A PUNITIVE DAMAGES AWARD

The availability of punitive damages is ordinarily determined by the local law of the relevant jurisdiction, in some instances by statute and in other instances by legal principles developed by courts. Under the Virgin Islands Code:

> The rule of common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the court of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

V.I. Code Ann. tit. 1, §4 (1967). Thus we turn to the Restatement for the prevailing standard.

Section 908(2) of the Restatement (Second) of Torts provides that "[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." In applying this section, we have previously stated that such conduct must be shown by clear and convincing evidence. *Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 (3d Cir. 1983). OCF argues that the evidence was insufficient to support the award of punitive damages or, in the alternative, that the verdict went against the clear weight of the evidence, requiring a new trial on whether punitive damages are appropriate.

In support of its argument, OCF points to evidence tending to show that prior to its decision to place warning labels on Kaylo boxes, the prevailing industry belief was

that asbestos insulation products were safe. *See* App. at 1522-24. OCF argues that its Kaylo product was considered an improvement over prior insulation products because it contained a lower percentage of asbestos. It points to an independent study conducted by Union Carbide between 1961 and 1963 which concluded that Kaylo, unlike Johns-Manville and Philip Carey products, could be safely used within the 5 million particles per cubic foot threshold limit value (TLV) established by the American Conference of Governmental Industrial Hygienists in 1946. *See* App. at 1355-72, 2287-97.

Nevertheless, we conclude that Dunn presented more than sufficient evidence from which a jury could conclude that OCF acted "with reckless indifference" in failing to place adequate warnings on its Kaylo product. Dunn's evidence revealed the following: In the early 1940s, insulation workers threatened to demand higher wages when using OCF's fiberglass material because of perceived health threats. *See* App. at 725-26. In response to this threat, Edward Ames, OCF's public relations officer and an assistant to its president, developed a plan to resolve this problem. As Ames explained, OCF had learned by this time that exposure to asbestos fibers could cause asbestosis. App. at 726.

In a memorandum to OCF's president and executive vice-president dated January 7, 1942, Ames made the following recommendation to inform workers of the extent of the hazard posed by asbestos-containing materials:

> Gather as a weapon-in-reserve an impressive file of photostats of medical literature on asbestosis. Available are two bibliographies covering medical literature to 1938, citing references to scores of publications in which the lung and skin hazards of asbestos are discussed. This file would cover five or six hundred pages . . . .

App. at 2151. This memorandum suggested that if OCF was unsuccessful in convincing union officials of the benefits of fiberglass as opposed to other asbestos-containing insulation products, then this "asbestosis weapon-in-reserve" would be sent to union workers to "let them stew." App. at 2152.

When asked if OCF's then-president, Harold Boeschenstein, knew that asbestos products might pose a hazard to the lungs, Ames answered, "Mr. Boeschenstein knew everything." App. at 727. In addition, OCF's attorney thought that Ames's plan was "a germ of a major strategy" and approved compiling an asbestosis file. App. at 729.

In 1943 Ames wrote another memorandum in which he criticized a proposal for adding asbestos to fiberglass, *see* App. at 732-33, writing:

> In formulating our policy on admixtures with asbestos, we should keep on the alert because otherwise *we will run the risk of smearing fiberglas [sic] with the hazards of exposure to asbestos.*
>
> Fabrication of asbestos (in both textile and pre-textile form) is a dusty process, and exposure to asbestos fly involves the danger of asbestosis, a pathological lung condition . . . minimized by the use of hoods and . . . respirators.

App. at 2154.

In 1944 Ames received a letter from a physician informing OCF that a patient of his, who had worked as an insulator, had developed asbestosis from exposure to insulation products. The letter stated in pertinent part:

> pipe coverer handling . . . asbestos . . . products on industrial insulation jobs [was] suffering from asbestosis, a condition that results from exposure to asbestos dust. The disease is a well recognized form of lung pathology that manifests itself in a diminution of lung capacity resulting in dyspnea or shortness of breath.

App. at 2155.

OCF began distributing Kaylo products in 1953, and from 1958 until 1972 manufactured Kaylo insulation. App. at 1068. In the 1950s, Dr. Garret Schepers, head of the Saranac Laboratory in New York, warned OCF that Kaylo contained material that would be hazardous to human beings. App. at 1018. Dr. Schepers also wrote two letters to Dr. M.D. Burch, director of personnel and industrial

relations at OCF at the time, advising him that "asbestos is fairly well incriminated as a carcinogen," App. at 2198, and that asbestos dust caused fibrosis. App. at 2207. Despite these warnings, OCF published brochures which repeatedly represented Kaylo as "non-toxic." App. at 2209, 2210, 2211, 2212, 2215. In addition, OCF touted Kaylo's "ease of application," *see* App. at 2211, and its "pleasant handling characteristics." App. at 2212. These brochures contained no warning of potential hazards.

A 1960 study of one of OCF's Kaylo manufacturing plants revealed that excessive asbestos dust exposure resulted from simply packing Kaylo into boxes. App. at 220-22. In 1963 the head of OCF's product development laboratory informed various corporate officers around the country that "[a]sbestos (as found in Kaylo) when breathed into the lungs causes asbestosis which often leads to lung cancer." App. at 2221. In 1964 the National Insulation Manufacturers Association, of which OCF's representative was a director, noted that Johns Manville had decided to place warnings on its asbestos products. App. at 2225. OCF, however, declined to do so, *see* App. at 2229, even though it knew that insulators had a six to seven times greater incidence of lung cancer than the general male population. App. at 2226.

In early 1965, Dr. F.H. Edwards of OCF wrote to OCF's medical director as well as other corporate officials urging that serious consideration be given to labelling Kaylo products since "the amounts requested [by claimants] are usually sizeable." App. at 2229. Dr. Edwards reiterated this suggestion in a memorandum dated August 6, 1966 in which he also acknowledged that "[i]t is impossible to guess the amount of dust created by the cutting, sawing, etc. of Kaylo. There are too many local factors involved." App. at 2230-31. Although OCF claimed that by December 1966 it had placed warning labels on its products,[2] *see* App. at 1230, Dunn testified that he did not see warning labels on any of the cartons holding Kaylo that he observed in the

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2. In a memorandum dated December 19, 1966, it was stated that a warning label should be "show[n] on all cartons in which we deliver Kaylo products." App. at 2236.

Virgin Islands. App. at 870, 873. This testimony was echoed by McComely Bully, one of Dunn's co-workers at HOVIC. *See* App. at 623-34, 645. OCF did not offer the testimony of any HOVIC worker to the contrary.

Dr. Egilman testified about the medical literature available at the time concerning the potential harm of exposure to asbestos dust. He noted that in the 1930s medical literature questioned the health effects of exposure to asbestos by insulators, particularly if the dust could be seen. App. at 167-71. In 1947 the confidential Hemeon Report was issued to the Asbestos Textile Institute, of which OCF has never been a member. This report questioned whether the then-generally acknowledged TLV for levels of exposure to asbestos provided "complete assurance[s]" of "thorough[] safe[ty]." App. at 2181. Finally, Dr. Egilman testified about a 1949 article in the Journal of the American Medical Association which recognized that asbestos workers were at risk of developing cancer. App. at 233. In his opinion, that article "establishe[d] that the general medical community was aware of the fact that asbestos caused cancer." App. at 233.

In light of this evidence, we agree with the recent conclusion of the Virginia Supreme Court that

> [t]he jury may have concluded . . . that Owens-Corning knew that inhalation of dust from its Kaylo product could cause lung disease in humans, that it actively concealed this danger, and it did not warn insulators of this hazard . . . .

Owens-Corning Fiberglas Corp. v. Watson, 413 S.E.2d 630, 642 (Va. 1992). The jury could reasonably have found that OCF acted with "reckless indifference to the rights of others" in this case, Restatement (Second) of Torts § 908(2) (1977), and thus, the district court appropriately denied OCF's motion for JNOV and did not abuse its discretion in refusing to grant unconditionally the motion for a new trial.

II.

DUNN'S CLOSING ARGUMENT

OCF claims that it was denied a fair trial on the issue of punitive damages because of several remarks made by Dunn's counsel during closing arguments to the jury. Specifically, OCF argues that the following remarks or actions were improper: (1) the argument that the jury should return a large punitive award to force OCF to stop defending asbestos cases, *see* App. at 1761; (2) the suggestion by Dunn's counsel that counsel for OCF lied to the jury,[3] *see* App. at 1755; (3) the argument that the jury should award punitive damages as a reward to Dunn for bringing this lawsuit, *see* App. at 1756; (4) the request that the jury draw an analogy to the criminal fine imposed on Michael Milken earlier that week, *see* App. at 1758-59; and (5) the appeal to the jury's local prejudice against "this big multi-national company."[4] *See* App. at 1762.

At the outset, we note that there are aspects of the plaintiff's closing argument that we believe crossed the line between acceptable advocacy and imprudent zeal. However, our disapproval of portions of the closing is not enough to warrant reversal on that ground. We note that OCF failed to make a timely objection with respect to the statements referred to in (1), (3)[5] and (5)[6] above, and thus has waived

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3. Specifically, Dunn's counsel stated:

> Unfortunately, ladies and gentlemen, you have heard a story here in this courtroom the last two weeks of corporate manipulation, of corporate suppression, and a word that I hate to use, of corporate lies.
>
> But, what's so bad about that is just not things that occur over the last 40 or 50 years. But, it's even occurred in this courtroom. It's occurred in this courtroom.

App. at 1755.

4. Specifically, Dunn's counsel argued: "You've got to have courage to tell this big multi-national company, that it's not going to come into the Virgin Islands and hurt people and lie about it." App. at 1762.

5. Comment e to the Restatement (Second) of Torts § 908 (1977), which discusses punitive damages, states in relevant part: "Included in the

its challenge to these statements on appeal. *See Woods v. Burlington N. R.R.*, 768 F.2d 1287, 1292 (11th Cir. 1985) (per curiam) (when party fails to object to improper closing argument, court of appeals only "retain[s] the authority to review for plain error[, the exercise of which] is seldom justified in reviewing argument of counsel in a civil case"), *rev'd on other grounds*, 480 U.S. 1 (1987); *Hyman v. Life Ins. Co.*, 481 F.2d 441, 444 (5th Cir. 1973) (same); *see also DeRance, Inc. v. PaineWebber, Inc.*, 872 F.2d 1312, 1326 (7th Cir. 1989) (motion for mistrial on grounds of improper closing argument did not preserve issue for appeal when motion lacked requisite specificity).

Although OCF did preserve its claims with respect to points (2) and (4),[7] in general "the trial judge is in a better position than an appellate court to determine whether remarks of counsel are prejudicial," *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975), and "at least for civil trials, ... improper comments during closing arguments rarely rise to the level of reversible error." *Littlefield v. McGuffey*, 954 F.2d 1337, 1346 (7th Cir. 1992) (internal quotation omitted); *see Lewis v. Penn Cent. Co.*, 459 F.2d 468, 470 (3d Cir. 1972), (trial judge has broad discretion in determining whether counsel's closing remarks were proper).

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harm to the plaintiff may be considered the fact that the plaintiff has been put to trouble and expense in the protection of his interests, as by legal proceedings in this or in other suits." Thus, arguably statement (3) was not, in itself, inappropriate.

6. In *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975), we concluded that a similar remark made in plaintiff's closing argument on punitive damages was not "so prejudicial ... as to constitute reversible error in the absence of any objection or request for a cautionary instruction." We also noted that "it is proper to assess punitive damages as a deterrent and *an example to the community*." *Id.* (emphasis added).

7. During Dunn's closing argument, counsel for OCF objected to the analogy to Michael Milken and asked for a curative instruction, which the court declined to give. *See* App. at 1758-59. In addition, directly following Dunn's closing arguments, counsel for OCF moved for a mistrial, specifically objecting to Dunn's argument that "we came in here and lied." App. at 1763.

Here, the district court concluded that the remarks about corporate lies "are not improper in a summation regarding punitive damages," *Dunn*, 774 F. Supp. at 949, relying on the trial court's statement in *Herman* that "[i]n attempting to convince a jury that a defendant's conduct was outrageous and should be punished, an advocate must go beyond the kind of argument necessary to establish ordinary negligence." 379 F. Supp. 1268, 1276 (D.V.I. 1974) (footnote omitted), *aff'd*, 524 F.2d 767 (3d Cir. 1975); *see also Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 197-98 (4th Cir. 1982) (permissible range in punitive damage arguments is wide and inescapably volatile), *cert. denied*, 460 U.S. 1102 (1983), *rev'd in part on other grounds*, 712 F.2d 899 (4th Cir. 1983) (in banc), *cert. denied*, 464 U.S. 1040 (1984).

OCF relies on *Draper v. Airco, Inc.*, 580 F.2d 91 (3d Cir. 1978), to support its claim that Dunn's reference to "corporate lies" constituted reversible error. However, that case is distinguishable. In *Draper*,

> [c]ounsel for the plaintiff . . . committed the following improprieties: (1) he attempted to prejudice the jurors through repeated inappropriate references to the defendants' wealth; (2) he asserted his personal opinion of the justness of his client's cause; (3) he prejudicially referred to facts not in evidence; and (4) without provocation or basis in fact, he made several prejudicial, vituperative and insulting references to opposing counsel.

Id. at 95.[8] The remarks of Dunn's counsel, while arguably intemperate, did not approach the unprofessional and prejudicial conduct of the attorney in *Draper*; the reference to lies told in the courtroom hardly qualifies as a "vituperative and insulting" reference to counsel for OCF. When read in context, Dunn's counsel's argument

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8. We note that references to the defendant's wealth are not, in themselves, inappropriate in a closing argument on the issue of punitive damages. *See* Restatement (Second) of Torts § 908(2) (1977); *Herman*, 524 F.2d at 772 ("the wealth of the defendant is a factor which may properly be considered by the trier of fact in assessing punitive damages").

regarding "corporate lies" referred to statements made by OCF and its witnesses, not its attorneys.

Our review of Dunn's closing argument reveals that his counsel referred to Milken to stress the point that OCF as a wrongdoer should be punished. Punishment is one of the goals of punitive damages. *See* Restatement (Second) of Torts § 908 cmt. a (1977). The district court was in the best position to assess any potential prejudicial impact of this reference. In light of the evidence presented as to OCF's conduct and the closing argument as a whole, we cannot conclude that the district court abused its discretion in not providing a curative instruction or in declining to order a mistrial.

III.

JURY CHARGE

OCF claims that the jury charge was defective both under Virgin Islands law and the federal constitution for failing adequately to explain how to determine the amount of the punitive damages.

A. *Virgin Islands Law*

OCF argues that the court's instruction was inadequate under Virgin Islands law because it did not inform the jury of the relevance of plaintiff's actual injuries in calculating punitive damages. We need not decide whether Virgin Islands law requires such an instruction,[9] because OCF failed to make a timely and specific objection challenging

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9. Neither the language of the Restatement and the accompanying comments nor prior case law supports the proposition that punitive damages *must* be related to actual injuries. *See* Restatement (Second) of Torts § 908(2) (1977) ("trier of fact *can* properly consider . . . the nature and extent of the harm to the plaintiff") (emphasis added); *id.* § 908(2) cmt. c (while "the extent of the harm *may* be considered in determining their amount, *it is not essential to the recovery of punitive damages* that the plaintiff should have suffered any harm, either pecuniary or physical") (emphasis added); *Hospital Auth. v. Jones*, 409 S.E.2d 501, 503 (Ga. 1991) (rejecting "notion that punitive damages must necessarily bear some relationship to the *actual* damages awarded by the jury"), *cert. denied*, 112 S. Ct. 1175 (1992); *Kirkbride v. Lisbon Contractors, Inc.*, 555 A.2d 800, 803-04 (Pa. 1989) (punitive damages need not bear reasonable relationship to compensatory damages under Restatement § 908; remittitur always available to reduce awards that shock the conscience).

the charge as erroneous under Virgin Islands law. Thus, this issue was not properly preserved for appeal under Federal Rule of Civil Procedure 51.[10] *See Don Kemper Co. v. Beneficial Standard Life Ins. Co.*, 425 F.2d 221, 222 & n.4 (3d Cir. 1970); *Bogacki v. American Mach. & Foundry Co.*, 417 F.2d 400, 407 (3d Cir. 1969).

OCF's only suggestion that "[t]he amount of punitive damages must bear a reasonable relationship to the actual damages suffered by the plaintiff" appeared in a proffered supplemental jury instruction, App. at 1497, which the district court did not consider because it was tendered after the cut-off for submitting instructions. *See* App. at 1592-94, 1605. In addition, despite being specifically informed by the district court at the time it proffered the supplemental instruction that "[a]fter [the] charge[to] the jury, you'll have a chance to make any exceptions you want to the charge," App. at 1594, OCF nevertheless failed to challenge the charge as deficient under Virgin Islands law after the charge was given. OCF's post-charge objections were limited to constitutional grounds, *see* App. at 1778, 1779, 1783, and the district court responded to OCF's objection on those grounds only. *See* App. at 1781, 1783; *see also Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132, 139 n.22 (3d Cir. 1973) (rejecting under Rule 51 appeal where defendant objected to charge on one ground but sought to appeal on another).

As we have noted in the past, the purpose of Rule 51 is to " 'afford the trial judge an opportunity to correct the error in h[er] charge before the jury retires to consider its verdict' and to lessen the burden on appellate courts by diminishing the number of rulings at the trial which they may be called on to review." *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 769 n.29 (3d Cir. 1990)

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10. This Rule states in pertinent part:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*

Fed. R. Civ. P. 51 (emphasis added).

(quoting *Porter v. American Export Lines, Inc.*, 387 F.2d 409, 412 (3d Cir. 1968)). In this case, a curative instruction could have remedied any infirmity in the charge. OCF's failure to make a specific objection to the court's instruction under Virgin Islands law subverted the purpose of Rule 51,[11] and we thus decline to review OCF's objections to the charge on that ground. *See United States v. Logan*, 717 F.2d 84, 91 (3d Cir. 1983) (absent objection, charge reviewed for plain error only); *Trent v. Atlantic City Elec. Co.*, 334 F.2d 847, 859 (3d Cir. 1964) (same).

B. *Constitutional Law*

OCF also argues that the charge was constitutionally infirm. It complains of the trial court's alleged (1) inadequate instruction on the dual goals of punitive damages; (2) failure to instruct the jury that it must take into consideration the character and degree of the wrong as shown by the evidence; and (3) inadequate post-trial review.

Before turning to the merits of OCF's constitutional challenge, we conclude that OCF failed to preserve the objection in (2) above under Rule 51. Following the jury charge, OCF objected that it was "unconstitutionally uninformed" because "it does not provide standards for the jury upon which to base an award of punitive damages." App. at 1778. This general objection alone was not specific enough to inform the court how to provide clearer standards.

OCF's proposed jury instruction did not contain language requiring the jury to consider the character and degree of the wrong to the plaintiff, *see* App. at 1636-38, and it never objected on that ground. The only objection we can find that remotely resembles the point now urged on appeal stems from OCF's suggestion that the amount of punitive damages must bear a reasonable relationship to the amount of compensatory damages. *See* App. at 1783. This objection did not adequately put the court on notice of the issue OCF now raises.

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11. In *Levinson v. Prentice-Hall, Inc.*, 868 F.2d 558, 564 (3d Cir. 1989), on which OCF relies, we found that the defendant had preserved its objection in accordance with Rule 51.

As the Court of Appeals for the Eighth Circuit recently stated in a similar case:

> Although [defendant] made a general objection that the court's instructions on punitive damages violated the fourteenth amendment, [its] requested instruction did not elaborate any further on the standard for setting the amount of punitive damages. While we recognize that a party need not tender specific language if it has otherwise objected to an inadequacy in an instruction, we believe the overall record here shows that [defendant] did not comply with Fed. R. Civ. P. 51 by bringing to the court's attention the need for the jury to consider the nature and degree of the wrong.

Robertson Oil Co. v. Phillips Petroleum Co., 930 F.2d 1342, 1347 (8th Cir. 1991) (footnote and citation omitted); *see also McCleary v. Armstrong World Indus., Inc.*, 913 F.2d 257, 260 (5th Cir. 1990). These words apply with equal force in this case, and thus we decline to review this point on appeal.

Turning to the remainder of OCF's constitutional objections to the charge, we look first to *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), where the Supreme Court held that the common-law method for assessing punitive damages is not so inherently unfair as to deny due process and be *per se* unconstitutional. *Id.* at 1043. The Court described the three-tier common-law method for assessing punitive damages as follows:

> Under the traditional common-law approach, the amount of the punitive damage award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Id. at 1042.

In its most recent pronouncement on punitive damages, *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479, 61 U.S.L.W. 4766 (filed June 25, 1993), the Court rejected the claim that "a $10 million punitive damages

award — an award 526 times greater than the actual damages awarded by the jury — is so excessive that it must be deemed an arbitrary deprivation of property without due process of law." *Id.* at 4768-69 (plurality opinion). As we interpret *TXO*, a plurality of the Court substantially adhered to the due process formulation first articulated in *Haslip*. Justices Scalia and Thomas, who concurred in the judgment, rejected the plurality's position that there exists "a substantive due process right that punitive damages be reasonable," 61 U.S.L.W. at 4773, and Justice Kennedy stated that the Constitution "does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions." *Id.* at 4772 (Kennedy, J., concurring in part and concurring in the judgment). Absent further guidance from the Court, we will rely on *Haslip*'s majority opinion in assessing OCF's due process challenge in this case. We note, however, that two of the concurring Justices characterized the procedures approved in TXO as "far less detailed and restrictive than those upheld in *Haslip*." *Id.* at 4774 (Scalia, J., with Thomas, J. concurring in the judgment).

In its analysis of the constitutionality of the punitive damages award in *Haslip* of more than $800,000, the Court eschewed drawing "a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 1043. The Court noted, however, that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." *Id.*

The Court looked first to the jury instruction and concluded that although it gave the jury "significant discretion," the instruction nonetheless "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." *Id.* at 1044. Although the district court's jury instruction in this case was not a word-for-word duplication of the charge in *Haslip*, it contained all of the elements identified by the Court in *Haslip*. The instruction adequately conveyed that punitive damages are

to punish the defendant and deter it and others from similar conduct in the future. *See* App. at 1777-78 ("It should be an award which stings [i.e., punishes] the defendant and will act as a deterrent to such conduct by the defendant in the future and a warning to others"). The district court also told the jury that it was not required to award punitive damages, and that such damages are "allowed only for wanton and reckless behavior . . . [where] defendant's conduct was outrageous because done with an evil motive or done with reckless indifference to the rights of others." App. at 1776.

Other courts of appeals have approved similar jury charges as providing due process under *Haslip*. *See Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1097 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992); *American Employers Ins. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1457-58 (11th Cir. 1991). *But see Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 105-06 (4th Cir. 1991). While we acknowledge that the district court could have given the jury more guidance on the issue of punitive damages,[12] we cannot conclude that the charge was constitutionally defective.

The second inquiry made by the Court in *Haslip* was whether the post-trial procedures ensure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages." 111 S. Ct. at 1044. Of course, if a charge is fatally defective, it will not be cured by post-trial review. We have found no fatal defect. Nonetheless, the scope of both trial court and appellate review were significant features in the Court's approval of the *Haslip* jury's punitive damage award, and thus we consider those applicable here.

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12. Under the Restatement, in determining the amount of punitive damages, the trier of fact can consider such factors as (1) the act itself, including the motives of the wrongdoer, the relations between the parties, and provocation or want of provocation; (2) the extent of harm to the injured person, including the expense to which plaintiff has been put in bringing a lawsuit; (3) the wealth of the defendant; and (4) the existence of multiple claims. Restatement (Second) of Torts § 908 cmt. e (1977).

In *Haslip*, the Court noted that under the applicable Alabama precedent, the factors a trial court considers in scrutinizing a jury verdict for excessiveness of the damages are "the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.' " 111 S. Ct. at 1044 (quoting *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986)).

Under federal law as well, a district court reviews damages awards for excessiveness. *See Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983) (remittitur available only when "so large as to shock the conscience of the court"). The district court in this case appropriately applied this standard, *see Dunn*, 774 F. Supp. at 950, and indeed ordered a remittitur and provided reasons for that decision. OCF complains that the trial court did not review the jury award *de novo*, but only gave it substantial deference. The court stated that it would " 'remit the portion of the verdict in excess of the maximum amount supportable by the evidence.' " *Id.* (quoting *Kazan*, 721 F.2d at 914). Nothing in *Haslip* requires more.

The Court's decision in *TXO* provides further support for our conclusion that the district court's review of the jury verdict in this case satisfied due process. In that case, the Court rejected a due process challenge based on the alleged inadequacy of the trial judge's review of the punitive damages award, even though the trial court failed to provide reasons for its denial of the petitioner's JNOV and remittitur motions. *See* 61 U.S.L.W. at 4772.[13]

We recognize that in *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), the court held that the procedure

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13. The Court did state that "it is always helpful for trial judges to explain the basis for their rulings as thoroughly as is consistent with the efficient despatch of their duties." *TXO*, 61 U.S.L.W. at 4772. We emphasize for the trial judges in this circuit the importance this court places on reasoned explanations of discretionary decisions. *See United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) ("[A]rticulation of the reasons for the decision tends to provide a firm base for an appellate judgment that discretion was soundly exercised.").

applied under South Carolina law to punitive damages awards did not provide due process, and that Virgin Islands procedure is similar in that neither jurisdiction mandates a set of criteria a jury must consider when calculating punitive damages. We are unpersuaded by *Mattison*. Instead, we agree with the holding in *Glasscock*, 946 F.2d at 1098-99, a diversity case involving Texas law, that federal post-trial review under Rules 50 and 59 and federal appellate review of a jury award provide sufficient constraint on a jury's discretion to satisfy the requirements of due process. *See also Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1377, 1380-86 (5th Cir. 1991) (same, in diversity case applying Missouri law).

Although the court in *Mattison* concluded that the standards for calculating punitive damages awards were unconstitutionally vague, relying on *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), *see Mattison*, 947 F.2d at 102-03, this precise argument was rejected by the Court in *Haslip*, which distinguished *Giaccio* on the ground that it concerned the imposition of liability rather than the jury's discretion in fixing the amount of damages or costs. 111 S. Ct. at 1046 n.12. Furthermore, we deem it significant that under Virgin Islands law (as under South Carolina law) a plaintiff must establish liability for punitive damages by clear and convincing evidence, a higher burden than under the Alabama scheme upheld in *Haslip*, which only required proof by a preponderance of the evidence. *See id.* at 1046 n.11 (specifically declining to hold that due process required a greater standard of proof).

Finally, we underscore the "fact intensive nature of the due process analysis articulated in *Haslip*." *Eichenseer*, 934 F.2d at 1386; *see also TXO*, 61 U.S.L.W. at 4770 ("[Punitive damages] awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it.") (plurality opinion).

In this case, after the district court reviewed the record and determined that the evidence supported a finding of willfulness and wantonness on OCF's part, *see Dunn*, 774 F. Supp. at 948-49, it considered OCF's net worth, the

relationship between the size of the compensatory award and its remitted punitive damages award,[14] and the size of such awards in other cases in determining that remittitur was appropriate. *See id.* at 951. This independent review led the court to conclude that a $2 million dollar award would both act as an adequate punishment and deterrent.[15] These factors considered in post-trial review were approvingly referred to in *Haslip*, and serve as an effective counterpoint to the wide discretion given the jury.[16]

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14. Specifically, the district court concluded that $2 million was an appropriate amount to offer in remittitur as "th[is] sum is rationally related to the $500,000 in compensatory damages without having exceeded the multiple of four constitutionally permitted by the Supreme Court in *Haslip*." *Dunn*, 774 F. Supp. at 951 (citation omitted). In *Haslip* the Court found the punitive damages award in that case to be reasonable even though it exceeded the compensatory award by four times because "it d[id] not cross the line into the area of constitutional impropriety." 111 S. Ct. at 1046. *See also TXO*, 61 U.S.L.W. at 4771 (indicating that a 10-to-1 ratio between punitive damages awarded and the potential harm of defendant's conduct would be constitutionally permissible) (plurality opinion).

15. We recommend that in the future district courts explicitly assess the amount of a punitive damages award in light of the factors set out in comment e of Restatement § 908. *See supra* note 12.

16. In *Haslip*, the Court listed the factors considered under Alabama law in post-trial and appellate review:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

111 S. Ct. at 1045. In addition, the Alabama Supreme Court conducts a comparative analysis. *Id.*

The third check referred to by the *Haslip* Court on the jury's or trial court's discretion was the Alabama Supreme Court's review of punitive awards. We will perform an analogous function in the next section. The Constitution requires no more.

IV.

EXCESSIVENESS OF THE PUNITIVE DAMAGES AWARDED

OCF's remaining contentions are directed to the allegedly excessive amount of punitive damages awarded. OCF first argues that the jury award was the result of passion, prejudice, or bias, and that the district court should have ordered a new trial unconditionally rather than conditioning the grant of a new trial on Dunn's acceptance of a remitted damages award. Of course, if OCF had shown that the jury verdict resulted from passion or prejudice, a new trial, rather than a remittitur, would have been the proper remedy. *See Mason v. Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1241 (5th Cir. 1985); *Brown v. McBro Planning & Dev. Co.*, 660 F. Supp. 1333, 1337 (D.V.I. 1987); *Schreffler v. Board of Educ.*, 506 F. Supp. 1300, 1308 (D. Del. 1981); *see also* 6A James Wm. Moore et al., *Moore's Federal Practice* ¶ 59.08[7], at 197-98 (2d ed. 1992).

However, we do not accept OCF's argument that in this case the size of the award alone was enough to prove

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In satisfying itself of the reckless character of OCF's conduct, examining OCF's net worth, and considering the relationship between the size of the compensatory and punitive awards, the district court found evidence to support three of the factors listed above (i.e., factors (a), (b), and (d)). It also conducted a comparative analysis. This review was enough to support the award of punitive damages in this case. *See Eichenseer*, 934 F.2d at 1382-84 (evidence in record sufficient to satisfy three of seven *Haslip* factors, and thus "the record in this case provides sufficient support for the award of punitive damages").

prejudice and passion. Even if there were some level of award that would in itself evidence prejudice and passion, *see Wells v. Dallas Indep. Sch. Dist.*, 793 F.2d 679, 684 (5th Cir. 1986), we cannot hold that the $25 million award here, albeit large, necessarily indicates a verdict tainted by prejudice and passion in light of the evidence before the jury concerning OCF's knowledge of the health hazards associated with asbestos, OCF's net after-tax earnings for the three years prior to trial which averaged almost $200 million, and OCF's net worth of approximately $2.2 billion. App. at 1743.

In *Cash v. Beltmann North American Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990), the court, after reviewing several punitive damage awards cases, concluded that "a typical ratio for a punitive damages award to a defendant's net worth may be around one percent." In this case, the jury's $25 million award (approximately 1% of OCF's $2.2 billion net worth) certainly fell within this range. *See also Gregg v. U.S. Indus., Inc.*, 887 F.2d 1462, 1477 (11th Cir. 1989) (approving $2 million punitive damages award which represented ".4% of [defendant's] net worth of $520 million"); *Burke v. Deere & Co.*, 780 F. Supp. 1225, 1238 (S.D. Iowa 1991) (remitting $50 million punitive damages award to $28 million, approximately 1% of defendant's $2.8 billion net worth).

A multi-million dollar punitive damages award is not unique in products liability cases. *See, e.g., Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) ($6.1 million in asbestos case); *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987) ($10 million in toxic shock syndrome case), *cert. denied*, 486 U.S. 1032 (1988); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985) ($1.5 million in asbestos case), *cert. denied*, 478 U.S. 1021 (1986); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517 (D. Minn. 1989) ($7 million in I.U.D. case); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) ($6.2 million in Dalkon Shield case).

If an excessive jury determination were *per se* proof of passion, prejudice, or bias, there would have been no reason for the Supreme Court to have said in *Haslip* that "[t]he Alabama Supreme Court's post-verdict review ensures

that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." 111 S. Ct. at 1045. We have held that "where no clear judicial error or 'pernicious influence' can be identified but where the verdict is so large as to shock the conscience of the court," the appropriate action for the court is to "order[] plaintiff to remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur [is] refused, to submit to a new trial." *Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983).

Many courts have sustained or ordered remittiturs involving reductions to jury punitive damage awards comparable to that ordered here, thereby implicitly rejecting the argument that an excessive jury award in itself is a basis for a new trial. *See, e.g., Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 818-19 (1981) ($125 million to $3.5 million; more than 30 to 1 ratio); *State Farm Mut. Auto. Ins. Co. v. Zubiate*, 808 S.W.2d 590, 605-06 (Tex. Ct. App. 1991) ($15 million to $660,000; more than 20 to 1); *West v. Johnson & Johnson Prods., Inc.*, 174 Cal. App. 3d 831, 871-72 (1985) ($10 million to $1 million; 10 to 1), *cert. denied*, 479 U.S. 824 (1986); *Gregg v. U.S. Indus., Inc.*, 887 F.2d 1462, 1477 (11th Cir. 1989) ($18.5 to $2 million; more than 9 to 1); *Republic Ins. Co. v. Hires*, 810 P.2d 790, 792-93 (Nev. 1991) ($22.5 million to $5 million; more than 4 to 1); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 836-37 (Minn. 1988) ($12.5 million to $4 million; more than 3 to 1), *cert. denied*, 492 U.S. 926 (1989); *Mason*, 948 F.2d at 1561 ($25 million to $12.5 million; 2 to 1).

In *Acosta v. Honda Motor Co.*, in considering the issue of punitive damages awards against a manufacturer of a harmful product, we noted that "a jury might decide that a defendant's financial position, as a result of other awards of punitive damages for the same conduct, is so precarious that a sizeable award of punitive damages would be inappropriate." 717 F.2d 828, 839 n.17 (3d Cir. 1983). In this case, OCF made the strategic decision not to introduce into evidence before the jury information concerning other punitive damages awards assessed against it. Had it done so, the jury might have made a smaller award. We thus

conclude that OCF has failed to prove that the jury's verdict, admittedly quite large, reflected such passion and prejudice as to mandate a new trial.

OCF contends that when the trial court calculated its remitted punitive damages award, it refused to consider OCF's submission regarding other awards against it because the court believed that evidence should have been presented to the jury. There is nothing in the district court's opinion that supports OCF's contention.

Nor does OCF point to anything in the record to support its contention that the trial court set the remitted damages figure by taking into account OCF's conduct toward persons other than Dunn. Recently, several courts have rejected due process challenges by asbestos manufacturers, concluding in each case that "the evidence demonstrated that the punitive damage awards were only for the harm inflicted upon the specific plaintiffs. . . ." In each case. *Owens-Illinois v. Armstrong*, 591 A.2d 544, 557 (Md. Ct. Spec. App. 1991), *aff'd in part & rev'd in part*, 604 A.2d 47 (Md.), *cert. denied*, 113 S. Ct. 204 (1992); *see also King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1030 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir.), *cert. dismissed*, 497 U.S. 1057 (1990); *Man v. Raymark Indus.*, 728 F. Supp. 1461, 1466 (D. Haw. 1989); *Eagle-Picher Indus., Inc. v. Balbos*, 604 A.2d 445, 472 (Md. 1992). In fact, in this case the district court explicitly referred to the amount of the compensatory damages awarded to Dunn when it calculated the amount of the remitted punitive damages award, thus demonstrating that the punitive damages award was intended to represent punishment for OCF's conduct with respect to Dunn. The district court's charge that the jury only award punitive damages if "plaintiff has clearly and convincingly established that *the action of defendant which caused injury to the plaintiff* was wanton and reckless," App. at 1776 (emphasis added), further reveals the court's awareness that punitive damages were to be assessed only with respect to the harm OCF caused Dunn.

OCF argues that its "negative net worth" militates against a large punitive damages award. The ability to pay, as will

be developed below, is a relevant factor in assessing punitive damages awards, but OCF is not well-situated to raise this issue. As Dunn's expert witness testified, OCF's large indebtedness was incurred to ward off a take-over attempt in 1986, App. at 1740-41, and it thus obscures the company's true value. The expert estimated OCF's value at the time of trial to be around $2.2 billion, App. at 1743, basing this figure on OCF's annual average after-tax earnings of approximately $200 million for each of the three years prior to trial. Thus, the $2 million award fixed by the trial court was well within OCF's ability to pay, and in itself would not require the further remittitur sought by OCF.

We turn next to our role in the assessment of punitive damages. We cannot leave the amount of punitive damages solely to the trial court because it is evident to us that the Supreme Court in *Haslip* approved review by an appellate court to "determin[e] whether a particular award is greater than reasonably necessary to punish and deter." 111 S. Ct. at 1046. The principal issue impelling us to take this otherwise routine product liability case in banc is the effect of successive punitive damages awards in mass tort cases arising from the same course of conduct. We, as well as other courts, have expressed concerns in that regard. *See In re School Asbestos Litig.*, 789 F.2d 996, 1005 (3d Cir.) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"), *cert. denied*, 479 U.S. 852, *and cert. denied*, 479 U.S. 915 (1986); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-42 (2d Cir. 1967); *see also In re Federal Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 459 U.S. 988 (1982); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 (D.N.J.), *as modified*, 718 F. Supp. 1233, 1235 (D.N.J. 1989); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

Nevertheless, the vast majority of courts that have addressed the issue have declined to strike punitive damages awards merely because they constituted repetitive

punishment for the same conduct. *See Solly v. Manville Asbestos Disease Fund*, No. 91-3031, 1992 U.S. App. LEXIS 14030, at *21-22 (6th Cir. June 8, 1992) (construing federal due process and Ohio law), *cert. denied*, 113 S. Ct. 411 (1992) ; *Simpson*, 901 F.2d at 280-82 (construing federal due process); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 402-07 (5th Cir.) (construing Mississippi law), *cert. denied*, 478 U.S. 1022 (1986) ; *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1041-42 (5th Cir. 1984) (construing Texas law), *cert. denied*, 470 U.S. 1051 (1985); *Man*, 728 F. Supp. at 1465-68 (construing federal due process and Hawaii law); *Campbell v. ACandS, Inc.*, 704 F. Supp. 1020, 1021-23 (D. Mont. 1989) (construing Montana law); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 376-77 (E.D. Pa. 1982) (construing federal due process and Pennsylvania law), *aff'd sub nom. Van Buskirk v. Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985).

OCF seeks to have this court take the lead and strike the punitive damages award as repetitive, either under Virgin Islands law or on federal due process grounds. It argues that because of the volume of asbestos claims currently before the courts and likely to be filed in the future, the point of "overkill" has been reached with respect to punitive damages in asbestos litigation. OCF claims that asbestos manufacturers have been punished enough, and that the "avalanche" of compensatory claims is more than sufficient to serve the goals of deterrence and punishment. It urges this court, as the "Supreme Court of the Virgin Islands," *Polius v. Clark Equip. Co.*, 802 F.2d 75, 80 (3d Cir. 1986), to strike punitive damages claims in all asbestos cases tried in the territory.

Apparently OCF believes that our function as the highest reviewing court for the Virgin Islands affords us an opportunity that is not available to other federal courts which are constrained by diversity jurisdiction to be circumspect in predicting state tort law. *See Jackson*, 781 F.2d at 406 (noting limited authority of federal court sitting in diversity to extend state law substantially in the absence of explicit guidance from state courts). Yet federal courts have not been alone in declining to strike punitive damages awards on the ground that they constitute repetitive

punishment for the same conduct. States courts as well have rejected such a contention, both on due process and common law tort grounds. *See, e.g., Palmer v. A.H. Robins Co.*, 684 P.2d 187, 215-16 (Colo. 1984); *Balbos*, 604 A.2d at 472; *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 475-80 (N.J. 1986); *Davis v. Celotex Corp.*, 420 S.E.2d 557, 564-66 (W. Va. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 466 (Wis. 1980); *Froud v. Celotex Corp.*, 437 N.E.2d 910, 913 (Ill. App. 1982), *rev'd on other grounds*, 456 N.E.2d 131 (Ill. 1983); *Fibreboard Corp. v. Pool*, 813 S.W.2d 658, 687 (Tex. Ct. App. 1991), *cert. denied*, 61 U.S.L.W. 3669 (U.S. May 17, 1993) (No. 92-1502); *see also* Andrea G. Nadel, Annotation, *Propriety of Awarding Punitive Damages to Separate Plaintiffs Bringing Successive Actions Arising Out of Common Incident or Circumstances Against Common Defendant or Defendants ("One Bite" or "First Comer" Doctrine)*, 11 A.L.R.4th 1261, 1262 (1982 & Supp. 1992) (noting that courts "have generally held that no principle exists which prohibits a plaintiff from recovering punitive damages against a defendant or defendants simply because punitive damages have previously been awarded against the same defendant or defendants for the same conduct, or because other actions are pending against the defendant or defendants which could result in an award of punitive damages"). Indeed, OCF has brought no majority opinion from any court to our attention (and our research has not disclosed such a case) which holds that multiple punitive damages claims must be struck on either basis.

In concluding that multiple punitive damages awards are not inconsistent with the due process clause or substantive tort law principles, both state and federal courts have recognized that no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products. Indeed, these courts have noted the arbitrariness of imposing a cap on punitive damages awards in only a single jurisdiction. As the Supreme Court of Appeals of West Virginia recently stated:

> It seems highly illogical and unfair for courts to determine at what point punitive damage awards should cease. Obviously, those plaintiffs whose cases were heard first would gain the punitive monetary

> advantage. Certainly, it would be difficult to determine where the cutoff line should be drawn as between the first, tenth, or hundredth punitive damages award. Moreover, because asbestos trials are held nationwide, it is doubtful that one state's ruling would necessarily bind other jurisdictions.

Davis, 420 S.E.2d at 565-66; *see also Fischer*, 512 A.2d at 480 ("At the state court level we are powerless to implement solutions to the nation-wide problems created by asbestos exposure and litigation arising from that exposure."); *Jackson*, 781 F.2d at 406 ("The relief sought by [the asbestos manufacturer] may be more properly granted by the state or federal legislature than by this Court.") (quotation omitted).

Similar concerns were expressed by the American Law Institute, which in a 1991 Reporters' Study, concluded that even state legislative efforts to limit punitive damages awards were an inappropriate and ineffective means for addressing the multiple punitive damages award problem.[17]

> This kind of single-state action, however, is an ineffectual response to the problem, because one state cannot control what happens in other jurisdictions. In fact, *the state that acts alone may simply provide some relief to out-of-state manufacturers at the expense of its own citizen-victims*, a situation that hardly provides much law reform incentive for state legislators. Moreover, these formulas, which give the lion's share of the punitive award to the first victim able to win a judgment against a particular defendant, are unfair to subsequent plaintiffs and concomitantly risk providing too little deterrence to behavior of this type.

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17. The Reporters' Study noted that two states have taken legislative action in this area. A Georgia statute, applicable to product liability claims in Georgia courts, allows only a single punitive award (the first to be obtained) for all claims arising out of the same conduct. *See* Ga. Code Ann. § 51-125.1(e) (Michie 1990). A Missouri statute, which applies to most tort claims in the state, allows the defendant in a post-trial hearing to request credit for prior punitive damages awards arising from the same conduct. *See* Mo. Ann. Stat. § 510.263(4) (Vernon 1952 & Supp. 1992).

II American Law Institute, *Enterprise Responsibility for Personal Injury* 261 (1991) (emphasis added). As an alternative to state action, the Study supported a federal legislative solution "to authorize mandatory class actions for multiple punitive damages arising out of large-scale mass torts." *Id.* at 263.

These concerns are equally applicable to our role in reviewing punitive damages awards emanating from the Virgin Islands. Although we do not eschew our role as the final judicial voice on questions of law arising in the Virgin Islands, we are also cognizant that we have not been chosen for that role as directly as have the state supreme courts. This requires that we exercise restraint before imposing novel and/or experimental theories onto that territory's body of law.

We note further that our review as the Virgin Islands' highest court is not open-ended, but is guided by well-established principles. As we recognized in *Government of the Virgin Islands v. Harris*, 938 F.2d 401 (3d Cir. 1991),

> [a]bsent governing statute or precedent, a "hierarchy of sources for Virgin Islands law" is found under V.I. Code Ann. tit. 1, § 4 (1967). *Edwards v. Born, Inc.*, 792 F.2d 387, 389 (3d Cir. 1986). Under § 4, we look first to the common law rules set forth in the various *Restatements*. If no rules are available, we look to common law rules "as generally understood and applied in the United States." *Id. See also Polius v. Clark Equipment Co.*, 802 F.2d 75, 77 (3d Cir. 1986 (Where the Virgin Islands "has no governing statute . . . [and] [w]here the Restatement is silent and a split of authority exists, courts should select the sounder rule.").

Id. at 411 (footnote omitted).

The Restatement, which provides the most persuasive evidence of the common law "as generally understood and applied in the United States," and which we are obliged to consult before exercising whatever common law authority we have in this case, does not preclude successive claims of punitive damages arising out of the same course of conduct, but instead permits consideration of the existence

of multiple punitive damages claims against a defendant as a factor in assessing damages. *See* Restatement (Second) of Torts § 908 cmt. e (1977) ("Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct."). When courts on the mainland, particularly from the other jurisdictions comprising the Third Circuit, have declined to strike repetitive punitive damage claims and awards in asbestos cases, we are unwilling to treat the similar awards to Virgin Islands plaintiffs as any less justified.

As we indicated in *Polius*, 802 F.2d at 77, it is only appropriate for us to select the sounder of several possible alternative rules for the Virgin Islands when a genuine split of authority exists among the other American common law jurisdictions. Even if we were convinced that the approach OCF advocates were the sounder one, OCF has not shown such a split of authority on the question of the propriety of successive punitive damages awards.

We do not disagree with the concerns that have been expressed about punitive damages awards, particularly in the asbestos cases. We differ instead with those who would have the judiciary resolve the conflicting policy arguments. We refrain from adopting such an activist role on what is essentially a policy matter, and believe that insofar as OCF would have us enunciate a prohibition of successive claims of punitive damages in mass tort litigation as a matter of Virgin Islands law, that decision is best left to the United States Congress or the legislature of the Virgin Islands.[18]

To the extent that OCF claims that punitive damages in asbestos cases are as a general matter unconstitutional, we are not persuaded by its arguments. Although we recognize that some courts and commentators have called for the abolition of punitive damages altogether, *see, e.g.*, John

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18. In that regard, we find it telling that the Governor of the Virgin Islands recently transmitted a bill to the legislature concerning damages for personal injuries that proposed limiting punitive damages awards for economic and non-economic damages but expressly exempted "defective product claims" from its terms. *See* Bill No. 20-0041 to amend Tit. 5, Ch. 41, V.I. Code (introduced Feb. 1, 1993).

Dwight Ingram, *Punitive Damages Should Be Abolished*, 17 Cap. U.L. Rev. 205 (1988); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117 (1984), that position is not without its critics. In fact, the prevalent notion that we are facing skyrocketing or "runaway punitive awards," E. Barrett Prettyman, Jr., *Punitive Damages*, in *A Plan to Improve America's System of Civil Justice From the President's Council on Competitiveness* 75, 83 (1992), has been challenged by several commentators. *See* Michael Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 28 (Papers of the Roscoe Pound Found. 1991) [hereinafter *Demystifying Punitive Damages*];[19] *cf.* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 13 (1990) [hereinafter *Myth and Reality*]; Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System — And Why Not?*, 140 U. Pa. L. Rev. 1147, 1256 (1992) [hereinafter *Behavior of the Tort System*].

One study reported that in those relatively rare cases in which punitive damages are awarded at all,[20] these awards are frequently reduced on appellate review. *Demystifying Punitive Damages* at 30-32; *Behavior of the Tort System*, 140 U. Pa. L. Rev. at 1258-62. Another study concluded that "[t]he difference between punitive damages awarded and punitive damages paid is often dramatic." *Demystifying*

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19. After conducting an exhaustive search of several sources, including published opinions, computer databases, law reviews and legal commentaries, court records, trial verdict reporters, and interviews with lawyers involved in products liability cases, *see Demystifying Punitive Damages* at 2-4, Rustad and his associates located a total of 355 products liability cases involving punitive damages awards throughout the country in the quarter century from 1965-1990. *Id.* at vi.

20. In a study of punitive damages verdicts in 47 counties in 11 states, the authors noted that only 8.9% of *successful* products liability plaintiffs were also awarded punitive damages. *See Myth and Reality*, 75 Minn. L. Rev. at 38; *see also Demystifying Punitive Damages* at 24 (noting that while approximately 200,000 American women were injured by Dalkon Shield, there were only 11 punitive damages awards in the 51 cases that went to trial).

Punitive Damages at 32. Finally, OCF itself candidly admits that in the vast majority of the asbestos cases against it which go to trial, plaintiffs come up empty. *See* Appellant's Supplemental Brief at 11 (citing App. at 1943); *see also* App. at 1842-939. We, of course, take no position on the debate regarding the issue of punitive damages in mass tort cases, but merely observe that the underlying facts appear to be far from clear, despite high-profile commentary in that connection.

In his powerful dissent, Judge Weis has set forth numerous arguments against punitive damages in mass tort cases in general and in asbestos cases in particular. We decline to respond in kind because we do not believe that a judicial opinion of an intermediate appellate court is the appropriate forum for a debate on the policies for and against punitive damages. Indeed, those members of the in banc court supporting the judgment of the court may themselves have differing views on whether and when punitive damages should be awarded.

Judge Weis argues that a "national solution is needed," and would have this court step in because Congress and the Virgin Islands legislature have failed to impose the solution he believes is needed. We believe, to the contrary, that unless a particular defendant has made the showing requisite to a finding of a due process violation as to it, the lower courts have an obligation to follow existing legal principles. In this connection, we note that while the debate on punitive damages has raged in commentary and even among judges, the Supreme Court of the United States has had various opportunities in recent years to restrict or redirect punitive damages awards, and it has pointedly failed to do so. In *Haslip*, the Supreme Court noted that punitive damages at common law were referred to by Blackstone, and that even early Supreme Court cases upheld such awards. 111 S. Ct. at 1041-43. The Court had its most recent opportunity in *TXO* to overturn a punitive damages award that had received numerous adverse comments and publicity because of the exceedingly high ratio that the punitive damages bore to the compensatory damages (526 to 1), but it made no adverse comment on the award, reviewing only whether substantive due process

principles compelled a reversal. In their separate concurrences, Justice Kennedy referred to the possibility of "legislative intervention that might prevent unjust punitive awards," 61 U.S.L.W. at 4772, and Justice Scalia (with Justice Thomas) stated that "[s]tate legislatures and courts have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime." *Id.* at 4774. Indeed, Justice Scalia reiterated his earlier position in *Haslip* that "the Constitution gives federal courts no business in this area, except to assure that due process (*i.e.*, traditional procedure) has been observed." *Id.* We would be intrepid indeed were we to use this case as a vehicle to iterate a blanket policy judgment against punitive damages in asbestos cases in light of the Supreme Court's studied silence on the policy issue.

We do not preclude a particular defendant from invoking the due process clause as a basis for relieving it of punitive damages in a specific case. However, the evidence produced by OCF falls far short of demonstrating any due process violation here.

In *Simpson*, the Second Circuit rejected the contention of another asbestos defendant, Pittsburgh Corning Corp., that a $2.3 million punitive damages award was a substantive due process violation. The court posited that if "the fact-finder making the first award understood its assignment to be the selection of that sum of money appropriate to punish the tort-feasor for the full extent of its wrongful conduct, not merely a sum appropriate as punishment for the injuries to the plaintiffs in the lawsuit," 901 F.2d at 280, there might be a rationale for striking a subsequent award on due process grounds.[21] Inasmuch as OCF has not argued that this is an appropriate case to apply this "single punitive award" rationale, nor has it made the requisite

21. The court explained that this theory could only be applied where the defendant can demonstrate that the jury in the first case to reach final judgment "had a complete record of the full extent of [the defendant's] wrongful conduct in failing to warn all users of the dangers of its asbestos products, [] or that [the] jury was instructed to return a punitive award appropriate as punishment for the totality of such misconduct." *Simpson*, 901 F.2d at 281.

factual showing to support such a claim, we need not decide whether we would accept such a theory.

The second basis posited in *Simpson* on which a successive punitive damage award might be viewed as violating due process is that the aggregate of prior awards has reached the maximum amount tolerable under the Due Process Clause. This argument assumes that prior juries functioned in the traditional manner, limiting their awards of punitive damages in light of the injury inflicted on the plaintiff in a particular case.[22] This is essentially the argument made by OCF in this case. However, we agree with the Second Circuit that such an argument can be evaluated only if the judge has been "provided with a factual basis sufficient for evaluating the entire scope of the defendant's wrongful conduct .... Only with such factual information can the judge determine that the aggregate of prior awards punishes the entirety of the wrongful conduct to the limit of due process." *Id.* at 281.

Assuming *arguendo* that we would accept this analysis, the factual record made by the defendant must, as a prerequisite to relief on due process grounds, include evidence demonstrating the amount of punitive damages it has actually paid in the past. In this case, OCF has simply failed to make such a showing.

As noted above, OCF filed a post-trial affidavit listing other punitive damages jury verdicts entered against it. App. at 1941-49. Significantly, OCF also stated that post-trial motions or appeals were pending as to each and every non-settled verdict listed in its submission. It stated further that as to those verdicts which it settled, an unspecified albeit allegedly "substantial amount of the settlement reflect[ed] the punitive damages award[ed]." App. at 1946.

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22. The court in *Simpson* concluded that all asbestos cases involving a single defendant cannot "be lumped together for the purpose of testing punitive awards against the limits of due process." 901 F.2d at 281. "The wrongfulness of a defendant's conduct will normally be subject to varying assessments depending on the degree to which the dangers of its product were known at a particular time and the deliberateness of its conduct in declining to warn or even concealing dangers of which it was aware." *Id.*

As to the latter, *Simpson* stated that, "It is far from clear that sums paid in private settlements may validly be counted in determining when state-compelled punitive damages awards exceed the limits of the Fourteenth Amendment." 901 F.2d at 282. The failure to designate particular amounts of the settlements as representing punitive damages makes inclusion of these amounts problematic. The same is true of OCF's list of non-final awards of punitive damages. Thus, OCF has failed to prove that the aggregate award of punitive damages against it has been sufficient to meet the twin goals of punishment and deterrence underlying such awards.

Nor has OCF shown that it will not be able to pay future awards of either compensatory or punitive damages. OCF's 1990 Annual Report filed with the district court post-trial stated that as of December 31, 1990, OCF had approximately $1.26 *billion* in unexhausted insurance coverage under product liability insurance policies applicable to asbestos-related personal injury claims. App. at 2007. OCF charged to earnings $24 million in 1990 and $50 million in 1989 for the uninsured costs of asbestos claims and had related reserves of $115 million and $131 million as of December 31, 1989 and 1990, respectively. App. at 2008.[23]

In addition, the Report stated that the "disease mix of asbestos personal injury claims against the Company appears to have declined in severity in recent years. Moreover, many of the newer claims involve workers from

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23. In an appendix to its supplemental appellate brief, OCF submitted its 1991 Annual Report, which provides a further indication of the company's ability to pay future punitive damages awards. In particular, the Report notes that "the Company's products liability insurance policies should cover virtually all of the Company's cash expenditures for indemnity and defense costs for asbestos personal injury claims through 1996 or 1997. . . . The cash expenditures . . . for the unasserted claims covered by [an] $800 million [non-recurring, non-cash] charge to 1991 earnings are expected to be incurred over a period of approximately seven years, between 1996 and 1997 and 2003 and 2004." Appellant's Supplemental Brief, Appendix A, at 15.

The Report also noted that OCF's unexhausted product liability insurance reserves totaled $1.13 billion at the end of 1991. *Id.*

occupations with limited, if any, exposure to the Company's asbestos products. Accordingly, the Company anticipates achieving a gradual reduction in its per case indemnity payments." App. at 2006. Finally, the Report concluded that

> [a]lthough any opinion is necessarily judgmental and must be based on information now known to the Company, in the opinion of management, based on the Company's experience with these claims to date, the Company's assessment of the number, nature and severity of the pending claims and the trends in the filing of such claims, and the Company's analysis of its available insurance coverage and existing reserves, and of the Company's future business and financial prospects, the additional uninsured costs which may arise out of pending personal injury and property damage asbestos claims and additional similar asbestos claims filed in the future *will not have a materially adverse effect on the Company's financial position.*

App. at 2008 (emphasis added).

In sum, OCF simply has not made a "showing that the total [amount of punitive damages assessed so far] is even close to whatever limit due process might impose on the total punitive damages that may be assessed . . . for . . . misconduct with respect to asbestos warnings." *Simpson*, 901 F.2d at 281; *see* Restatement (Second) of Torts § 908 cmt. a (1977); *cf. Campbell*, 704 F. Supp. at 1023 ("the desired effect is to deter all individuals or entities involved in the manufacture and distribution of consumer products from placing the public at risk by engaging in similar conduct"). Nor has OCF shown on this record that it will be unable to satisfy current and future asbestos claims. Although the costs associated with asbestos litigation may have wiped out any profits OCF made from the sale of its Kaylo product, OCF failed to submit any evidence at trial concerning the profitability of its Kaylo product,[24] or

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24. It was only in its appendix to its supplemental brief to this court that OCF made any claim concerning the profitability of its Kaylo product.

concerning the profits of the other manufacturers. In any event, neither Virgin Islands law nor due process requires striking all punitive damages claims simply because the harm caused by a defective product was so severe as to wipe out all profit.

Of course, we do not decide whether another asbestos manufacturer might be able to satisfy this evidentiary hurdle with a different factual record. Nonetheless, we believe that the district courts in this circuit should determine whether a punitive award to a plaintiff in a particular case should be struck by carefully scrutinizing the "punitive damages overkill" evidence submitted to them, both with respect to past awards actually paid by a defendant and the defendant's ability to satisfy future punitive damages awards. These courts should also consider whether the financial status of the defendant is such that future claimants will be unable to collect even compensatory damages because of the limited pool of resources available. It is the defendant's burden to make this evidentiary showing, a burden OCF has not satisfied on the record before us.

Although we reject OCF's due process challenge, we nonetheless agree with OCF that further remittitur of the punitive damage award in this case is appropriate. *See Gumbs v. Pueblo Int'l, Inc.*, 823 F.2d 768, 773-75 (3d Cir. 1987); *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1040-41 (3d Cir. 1987). In reaching this conclusion, we take into consideration all the factors listed in comment e to Restatement of Torts (Second) § 908: the defendant's wealth, its act, the extent of harm, the multiplicity of claims, and, as approved in *Haslip*, the awards of punitive damages in similar cases.

Our review of the list of jury verdicts submitted by OCF to the district court indicates to us that even the $2 million

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See Appellant's Supplemental Brief, Appendix D, at 3-4 (estimating total sales at $142.7 million with total profit ranging from $1.4 million to $7.7 million). We are unwilling to act on the basis of such evidence, which was not before the district court and which was not subject to challenge by appellee.

dollar figure greatly exceeds the level of punitive damages awarded in other similar asbestos cases. While we commend the district court's discipline in reducing the punitive damages from $25 million to $2 million, we believe that the district court gave insufficient consideration to the effect of successive punitive awards in asbestos litigation. This factor, above all, leads us to conclude that the maximum amount of punitive damages that could reasonably have been awarded in this case is $1 million.

V.

CONCLUSION

Following the filing of the opinion of the panel of this court reaching the same conclusion, Dunn elected to file a remittitur of punitive damages awarded in excess of $1,000,000.

For the foregoing reasons, we will vacate the judgment of punitive damages and remand the case to the district court with instructions to enter a new judgment for punitive damages in the amount of $1,000,000. OCF to bear all costs on appeal.

ALITO, *Circuit Judge*, concurring:

I concur in the judgment. I also join Parts I, II, III, and V of the opinion of the court. I do not fully agree with the analysis in Part IV of the court's opinion, which discusses the question whether the punitive damage award in this case was excessive under Virgin Islands law or under the Due Process Clause. Hence, I write briefly to explain my disagreement with the court's discussion of those questions.

In considering the propriety of the punitive damages award under Virgin Islands law, I begin with 1 V.I.C. § 4, which states:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

In order to understand the meaning of this provision, I think it is helpful to examine its origins. Before 1917, the Virgin Islands were generally subject to "[t]he Common and Statute Law of Denmark." Colonial Law of April 6, 1906, § 67. After the United States acquired the Virgin Islands, Congress, in the Act of March 3, 1917, ch. 171, § 2, 39 Stat. 1132, provided for this body of Danish law to remain in effect "insofar as compatible with the changed sovereignty and not in conflict with the provisions of [this] Act." This provision was effectively abrogated, however, in 1920 and 1921, when the Colonial Councils of the Municipality of St. Croix and the Municipality of St. Thomas and St. John, acting pursuant to authority delegated by Congress in the 1917 Act, adopted comprehensive new Codes of Laws. Each of these Codes contained an identical provision stating that (tit. iv, ch. 13, § 6): "[t]he common law of England as adopted and understood in the United States shall be in force in this District, except as modified by this ordinance."

In *Callwood v. Virgin Islands Nat'l Bank*, 221 F.2d 770, 775 (3d Cir. 1955), our court, in an opinion by Judge Maris, interpreted this provision as follows:

> [T]he Virgin Islands have adopted the rules of the common law of England as followed and understood in the United States and we think that the district court in applying those rules is justified in considering the well considered expressions of them which the American Law Institute has incorporated in its Restatements of the Law.

At the time of the *Callwood* decision, a commission, which included Judge Maris as one of its members, was preparing what later became the Virgin Islands Code. This Code, including title 1, § 4, was enacted in 1957. The Revision Note for this provision states that the earlier provisions had been

> rewritten more accurately to express the concept of the Common Law as constituting a body of rules established by precedent, as distinguished from a body of statutory law, and to extend the application of the rules to the restatements of the law prepared and approved by the American Law Institute. See Callwood v. V.I. Nat. Bank, C.A.3d 1955, [3 V.I. 540] 221 F.2d 770.

In light of this history, I interpret 1 V.I.C. § 4 to mean that the law of the Virgin Islands, in the absence of a relevant statutory provision, is "the body of rules established by precedent"[1] "as generally understood and applied in the United States"[2] and that, as suggested in *Callwood*, the Restatements provide a presumptively authoritative summary of this body of precedent. I do not interpret 1 V.I.C. § 4 to mean that the Restatements, whether adopted before or after 1957, are tantamount to Virgin Islands statutes. On the contrary, I agree with the analysis of this question in *Varlack v. SWC Caribbean Inc.*, 550 F.2d 171 (3d Cir. 1977). Addressing a conflict between a provision of the Restatement (First) of Torts (issued in 1934) and a provision of a Tentative Draft of the Restatement (Second) of Torts, the court observed that "we read the statute as looking to the Restatements only as an

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1. 1 V.I.C. § 4, Revision Note.

2. 1 V.I.C. § 4.

expression of 'the rules of common law.'" 550 F.2d at 180 (emphasis in original).[3] Thus, 1 V.I.C. § 4 does not incorporate all of the Restatement provisions in effect in 1957 as if they were actual statutory text; nor does it delegate to the American Law Institute the authority to enact changes in the law of the Virgin Islands in all of the areas covered by the Restatements. While some of our opinions cite provisions of the Restatements as if they were statutory law, I respectfully submit that these references (which I take to be merely a form of shorthand) are potentially misleading.

It is also inaccurate, in my view, to suggest that we are free to do in this case whatever some state supreme court might feel free to do in a comparable case before it. The role of the highest court of each state is defined by its own state's constitution, statutes, and legal traditions, and many of these courts may have greater authority to contribute to the development of state common law than we have under 1 V.I.C. § 4.

Because of 1 V.I.C. § 4, our task, in considering whether the punitive damage award in this case is excessive under Virgin Islands law, is to determine whether the award is consistent with the general body of relevant precedents handed down by American courts. Working within this framework, I agree with the court that the award in this case, after remittitur, is permissible. To the extent that the court mounts a defense of the merits of these precedents, however, I disassociate myself from that analysis. When the common law as understood and applied in the United States provides a clear rule, 1 V.I.C. § 4 requires us to apply that rule regardless of our judgment as to the rule's merits. Congress and the Virgin Islands Legislature have the authority and discretion to pass new statutes and thereby adopt for the Virgin Islands different rules contrary to and arguably superior to the common law approach, but,

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3. *See also Hatze v. Hanover Insurance Co.*, 536 F.2d 576, 578 n.1 (3d Cir. 1976) ("It could be argued that the 1942 Restatement of Judgments no longer expresses the rules of the common law to the extent it requires mutuality, and that therefore the common law 'as generally understood and applied in the United States' governs.").

under current law, we do not have such authority. If we had such authority, however, I would find much in the existing precedents that merits critical reexamination.[4]

With respect to OCF's argument that the punitive damage award in this case violates due process, I agree with the court's conclusion that this argument is unsound. I am puzzled, however, by the fact that the court, in addressing this question, seems to place significant reliance on studies and articles that attempt to debunk the critics of punitive damages. Majority Op. at 29-41. I am at a loss to understand precisely what bearing these studies have on the constitutional question before us. I certainly do not think that the content of the Due Process Clause can be ascertained by tallying up the entries in the *Index to Legal Periodicals*. And I am not willing to appear to endorse the views on policy questions expressed in the writings that the court cites or to vouch for the accuracy of their underlying empirical research.

In sum, while I do not entirely agree with the analysis in

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4. Two examples illustrate my point. The first is the court's statement that "[e]ven if there were some level of award that would itself evidence prejudice and passion" and thus warrant a new trial, "we cannot hold that the $25 million award here, albeit large, necessarily indicates a verdict tainted by prejudice and passion." Maj. Op. 21. The court goes on to hold, however, that this award was not only "large" but *25 times too large*. Thus, the court in effect holds that even if an award could be so big that it would show passion or prejudice, an award that is merely 25 times too big is not big enough. I must say that I do not find this reasoning compelling.

The second example is the court's statement that "a typical ratio for a punitive damages award to a defendant's net worth may be around one percent." Maj. Op. 21. This pronouncement is based on a footnote in *Cash v. Beltmann North American Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990), which in turn cited as support for this proposition six reported cases in which the average ratio was 0.49% and the median was 0.21%. The footnote also includes a "but see" citation to two additional cases in which the ratios were 40% and 23.33%. To my mind, this extremely small and disparate sample does not show what the typical ratio is in fact. More important, this sample clearly does not show what ratio is needed to serve the purposes of punitive damages — to deter and punish.

Part IV of the court's opinion, I agree with its ultimate conclusion. I therefore concur in the judgment, and I join the portions of the court's opinion that were previously noted.

WEIS, *Circuit Judge, dissenting.*

I dissent from the judgment of the court permitting punitive damages in this case.

Asbestos litigation is unique. The large number of persons exposed to asbestos has caused a proliferation of claims, the likes of which courts have never seen, causing serious concern that the traditional tort system cannot adequately process the litigation. As this Court said in *In re School Asbestos Litigation*, 789 F.2d 996, 1000 (3d Cir. 1986), asbestos litigation presents "an unparalleled situation in American tort law."

In 1986, an estimated 30,000 personal injury suits had been filed against asbestos manufacturers and producers. *Id.* That figure has since increased substantially. By 1990, 30,401 asbestos cases were pending in the federal courts alone, with about double that amount in the state courts, for a total of approximately 90,000 cases. Judicial Conference Ad Hoc Comm. on Asbestos Litig., *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* (Mar. 1991), *reprinted in* Asbestos Litig. Rep., Mar. 14, 1991, at 22,698, 22,702-03. A study completed by the National Center for State Courts reports that there may be as many as 129,000 cases pending in state courts alone, making the total of federal and state cases approximately 160,000. State Judges Asbestos Litig. Comm., *Megatorts: The Lessons of Asbestos Litigation* (July 21, 1992), *reprinted in* Mealey's Litig. Rep. — Asbestos, Nov. 20, 1992, at B-1. Another report estimates that between 1990 and 2049 another 668,363 asbestos-related claims will be filed. Eric Stallard & Kenneth Manton, *Estimates and Projections of Asbestos-Related Mesothelioma and Exposures Among Manville Personal Injury Settlement Trust Claimants*, 1990-2049, at 42 (Draft Nov. 9, 1992).

It is not only claims for personal injuries and deaths resulting from asbestos that have inundated the courts. In addition, thousands and thousands of property damage cases further diminish the available pool of resources. *See, e.g., In re Sch. Asbestos Litig.*, 789 F.2d at 1005.

As might be expected, the flood of asbestos cases has taken its toll on the defendant asbestos manufacturers. The Ad Hoc Committee reported that of the twenty-five major asbestos companies, eleven had filed petitions in bankruptcy. Judicial Conference Ad Hoc Comm., *supra*, at 22,705. Later reports indicate that fifteen or sixteen companies have filed for bankruptcy. State Judges Asbestos Litig. Comm., *supra*, at B-2; Don J. DeBenedictis, *Model for Asbestos Settlements*, A.B.A. J., April 1993, at 22. Moreover, that "number does not include the numerous smaller distributors that have been targeted in the wake of absent manufacturers and who have in turn become insolvent." Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J. L. & Pub. Pol'y 541, 555 (1992).

The first of the major asbestos manufacturers to enter bankruptcy was Johns-Manville, which sought to use Chapter 11 essentially as a giant interpleader action. As part of the Manville reorganization, a trust was created to settle pending and future asbestos claims. Although the trust concept had the potential for equitably distributing assets to present and future claimants, the bankruptcy proceeding was itself very expensive and the results ultimately proved to be unsatisfactory.

Even though punitive damages were not allowed, the trust was essentially insolvent after operating for only a year and a half. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 754 (E. & S.D. N.Y. 1991), *vacated on procedural grounds*, 982 F.2d 721 (2d Cir. 1992). Reports indicate that the trust received 192,347 claims, Stefan Fatsis, *Lower Sums for Victims of Asbestos, quoted in* Phila. Inquirer, March 18, 1992, at C8, and that the trust's funds of approximately $2.6 billion were overshadowed by present and future liabilities estimated as high as $7 billion, *see In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 765. The swift depletion of assets was caused by high transaction costs, the failure to anticipate the magnitude of claims, and the fact that the average settlement was much higher than expected. *Id.* at 754-62. Additionally, the trust paid on a first come, first served basis, rather than on priority determined by the extent of injury.

The district court intervened to impose measures for a more equitable distribution of the funds and eventually approved an arrangement that altered the distribution process so that those most seriously injured were paid first. *Id.* at 768-70. In addition, a serious attempt was made to predict future claims so that present and future claimants would be paid an equitable percentage of their claims' value. *Id.*

In commenting on the settlement, the district court noted the grim prospects for future asbestos claimants in the absence of a solution. The current defendants "do not have, and they probably will not have, assets to pay for their current and contingent asbestos liabilities given the present mode of disposing of asbestos claims." *Id.* at 907. The Manville experience, thus, demonstrates that even purely compensatory payments for future claims are in jeopardy.

Subsequent claims and bankruptcy filings have increased the likelihood that future claimants will not be able to recover for their injuries. As the Ad Hoc Committee said:

> "[A] large number of individuals have claims . . . that are not yet ripe for adjudication. Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled.' *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1330 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986)."

Judicial Conference Ad Hoc Comm., *supra*, at 22,715-16. As one of its recommendations to Congress, the Committee suggested legislation "requiring treatment of available assets to take into account future claimants." *Id.* at 22,716.

It is within this setting of burgeoning litigation, corporate collapse, and future compensatory inadequacy that the present case involving punitive damages arises.

This Court is confronted for the first time with an asbestos case brought under Virgin Islands law where punitive damages have been awarded. We are in a position

similar to that of state supreme courts in determining the common law and Restatements applicable within this jurisdiction. We write on a clean slate and shoulder a clear responsibility to resolve a difficult issue. We are not bound, nor excused, by mistaken determinations in other jurisdictions in the past.

The desirability of permitting punitive awards has been subjected to vigorous assault in recent years, particularly in cases like the one before us. Whether the theories underlying exemplary damages hold true in the mass tort context has been questioned in such cases as: *In re Bendectin Prod. Liab. Litig.*, 749 F.2d 300, 305-07 (6th Cir. 1984); *In re N. Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1179-83 (8th Cir. 1982); and *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 725 (E.D. N.Y. 1983). In none of those instances, however, did the problem match the magnitude of the asbestos litigation crisis. As the State Judges Litigation Committee reports, "There is no more controversial issue in mass tort litigation than punitive damages." State Judges Asbestos Litig. Comm., *supra*, at B-9.

I do not propose to enter the debate here over the merits of punitive damages in general.[1] For purposes of this case, I accept the premise that in appropriate cases punitive damages may be assessed in the Virgin Islands. *See* Restatement (Second) of Torts § 908(2);[2] *Acosta v. Honda*

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1. For a representative — but by no means complete — sample of articles, *see* Dennis N. Jones, S. Brett Sutton & Barbara D. Greenwald, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1 (1991); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983); Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 573 (1983); Symposium, *Punitive Damages*, 40 Ala. L. Rev. 687 (1989); Symposium, *Punitive Damages*, 56 S. Cal. L. Rev. 1 (1982).

2. Professor Prosser, a Reporter for the Restatement (Second) of Torts, conceded that punitive damages in mass torts present a "problem which has arisen to haunt the courts." Noting the issue of multiple awards, he

Motor Co., 717 F.2d 828, 833-41 (3d Cir. 1983). However, it is necessary to discuss the justifications for punitive damages and whether those purposes are served in the mass tort area.

I propose to meet head-on an issue presented here — that is, whether unfairness to injured persons whose claims will come due after available funds have been exhausted requires a common law bar on continuing punitive awards. I will also review punitive awards in terms of unfairness to asbestos defendants and due process. *See TXO Prod. Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993); *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 26-27 (1991). Although there are serious questions of bias, prejudice, and improper closing arguments to the jury present in this record, I will not discuss them here.

I.

COMMON LAW PUNITIVE DAMAGES

The Restatement (Second) of Torts § 908(2) provides that "[p]unitive damages *may* be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." (emphasis supplied). Comment a explains that "[t]he purposes of awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future."

When considering punitive awards, several basic principles must be emphasized. First, punitive damages are designed for retribution and deterrence. "They are not compensation for injury. Instead, they are private fines

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wrote: "The question might well lead to a re-examination of the whole basis and policy of awarding punitive damages." William L. Prosser, *The Law of Torts* § 2, at 13 (4th ed. 1971). Indeed, a recent report to the American Law Institute suggests major alterations in the law of punitive damages. 2 American Law Inst., *Reporters' Study on Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 256-64 (1991).

levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The fairness inherent in due process requires that punitive assessments not exceed those amounts necessary to inflict retribution and prevent reoccurrence. *See, e.g., Vasbinder v. Scott*, 976 F.2d 118, 121 (2d Cir. 1992). When retribution and deterrence are accomplished without the imposition of punitive damages, use of that weapon is no longer justified.

Second, punitive damages are a windfall. They do not reimburse losses that plaintiffs have suffered, but provide an amount over and above that necessary for fair compensation. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981).

Third, there is no compelling reason why injured but fully compensated plaintiffs should receive punitive awards. The aims of retribution and deterrence can be accomplished by making punitive damages payable to the state.[3] Indeed, nine states have enacted statutes that designate that a portion of any punitive award goes to the state, ranging from 20% in New York to 75% in Iowa and Georgia. Colo. Rev. Stat. § 13-21-102(4); Fla. Stat. Ann. § 768.73; Ga. Code Ann. 51-12-5.1(e)(2); Ill. Ann. Stat. ch. 110, par. 2-1207; Iowa Code Ann. § 668A.1(2)(b); Mo. Ann. Stat. § 537.675; N.Y. Civ. Prac. L. & R. § 8701; Or. Rev. Stat. § 18.540; Utah Code Ann. § 78-18-1(3).[4]

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3. *See* E. Jeffrey Grube, *Punitive Damages: A Misplaced Remedy*, 66 S. Cal. L. Rev. 839, 850-55 (1993).

4. The constitutionality of such provisions has been challenged in three of those states. In *Gordon v. State*, 585 So. 2d 1033, 1035-36 (Fla. App. 1991), *aff'd*, 608 So. 2d 800 (Fla. 1992), *cert. denied*, 113 S. Ct. 1647 (1993), the Court found the Florida provision constitutional because a claimant does not have a cognizable right to the recovery of punitive damages. However, in *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990), and *Kirk v. Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991), the courts found statutes unconstitutional. *McBride* held that the Georgia statute violated the Equal Protection Clause because it only applied to product liability claimants and allowed non-product liability claimants to recover 100% of their awards. 737 F. Supp at 1569-70. *Kirk* ruled that a punitive damages judgment is a private property right and that the Colorado statute is an unconstitutional taking of property. 818 P.2d at 272.

In the asbestos context, punitive awards are not needed for retribution and deterrence. Actually, there is little conduct to deter because few asbestos-containing products are still manufactured in the United States.[5] Owens-Corning, the defendant in this case, ceased manufacturing asbestos-containing Kaylo in November 1972, more than twenty years ago, and no longer produces or distributes any asbestos-containing products. That being so, this punitive award cannot be justified by a concern that Owens-Corning will continue its challenged practice in the future. *See Magallanes v. Superior Court*, 213 Cal. Rptr. 547, 552 (Ct. App. 1985) ("[T]he objective of deterrence has little relevance where the offending goods have long since been removed from the marketplace.").

Moreover, the avalanche of compensatory claims against asbestos manufacturers has surely served as more of a punishment and deterrent than individual punitive assessments in isolated cases against manufacturers of other types of products. As one judge has explained:

> "No manufacturer could engage consciously in wrongdoing that would expose it to such overwhelming strict liability with any reasonable expectation of doing so profitably. On the contrary, the prospect of exposure to massive litigation in strict liability provides the impetus for manufacturers to take affirmative steps to ensure the safety of their products, since mere non-negligent behavior is no guarantee against strict liability.
>
> The significance of punitive damages as a deterrent depends upon the size of the penalty increase relative to the 'base penalty' exacted by strict liability compensatory awards. Because of the dimensionless character of the prospects for future litigation in this instance, the 'base penalty,' for all practical purposes, is illimitable. Correspondingly, the significance of punitive damages as a deterrent diminishes to the vanishing point."

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5. Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1863-66 (1992).

Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 527 (1984), *vacated*, 750 F.2d 1314 (5th Cir. 1985) (en banc).

That point is illustrated strikingly by Owens-Corning's experience. Compensatory awards have consumed all profits made from the sale of asbestos-containing products. Total gross sales of Kaylo were $142,720,000. As of May 31, 1991, defendant had paid claims for "hundreds of millions of dollars" in 62,588 cases and incurred litigation expenses in excess of $100 million. In 1990 alone, $117 million was paid on 12,300 claims. In addition, 86,192 cases are presently pending with hundreds more being filed each month. In these circumstances, punitive awards are certainly not necessary to provide an effective deterrent.

Some courts and commentators have expressed concerns that the denial of punitive damages in a mass tort setting might in effect reward defendants because the harm caused was so extensive.[6] However, such concerns have no validity here. It is disingenuous to speak of reaping a "reward" when compensatory damages dwarf any profits made from asbestos-containing products and those damages by themselves have forced manufacturers into bankruptcy.[7]

The Ad Hoc Committee cited a 1984 Rand study reporting that in a sample period between 1980 and 1982, punitive damages totalling $4,934,000 had been awarded in asbestos cases. Judicial Conference Ad Hoc Comm., *supra*,

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6. "[W]e do not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they may have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape *all* liability for punitive damages." *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910, 913 (1982), *rev'd on other grounds*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983).

7. As one commentator explained, punitive damages seek "to deter a specific course of conduct by decreeing that a manufacturer already condemned to 'death' via bankruptcy for engaging in a course of conduct resulting in enormous compensatory liability, would again be condemned to extinction if the act were particularly heinous. 'Dying' a second time is certainly inconvenient and while the prospect may accelerate the rate of the 'first' death, that hardly constitutes deterrence." Lester Brickman, *supra* at 1864.

at 22,724 n.54. More recent figures are substantially higher.[8] In testimony before a House Subcommittee on February 26, 1992, Judge William Schwarzer, the Director of the Federal Judicial Center, said:

> "Punitive damages compete with compensatory damages for the increasingly scarce resources of asbestos defendants and their insurers. Until the claims of future claimants become liquidated, distribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discover their injuries. Some mechanism to avoid this outcome, at least until more precise information becomes available about future claims, may be necessary for a national solution that has meaning for future claimants."

Asbestos Litigation Crisis in Federal and State Courts: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 132-33 (1992) (statement of Hon. William W. Schwarzer).

Judge Schwarzer also noted that less than 1% of asbestos cases proceed to judgment. *Id.* at 137. Thus, punitive damages as such are only available in that small percentage of cases. Moreover, they are not awarded in every trial even though the same defendant and the same conduct is at issue. Nevertheless, the potential for punitive awards is a weighty factor in settlement negotiations and inevitably results in a larger settlement agreement than would ordinarily be obtained. To the extent that this premium exceeds what would otherwise be a fair and reasonable settlement for compensatory damages, assets that could be available for satisfaction of future compensatory claims are dissipated. *Id.* at 137-38.

Rather early in the wave of asbestos litigation, a minority of the Court of Appeals for the Fifth Circuit forcefully questioned whether the industry's resources would be

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8. The compilation of judgments that defendant provided to the court in this case lists a single punitive award for $150 million and other awards from 1989 and 1990 totaling approximately $113 million.

adequate to compensate future claimants. *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1330 (1985) (en banc) (Clark, J., joined by four others dissenting). *later appeal*, 781 F.2d 394, 415-17 (5th Cir. 1986) (en banc) (Clark, J., joined by four others dissenting). A majority of that Court decided to certify to a state court the question of whether plaintiffs could recover punitive damages in asbestos cases. The dissenting judges, arguing that the problem was national in scope, advocated taking a more forceful stand. Noting that the "field of asbestos litigation [had] exploded," they pointed out that an "already astronomical and still growing number of plaintiffs [are] seeking individual recoveries against a finite pool of assets belonging to a relatively small group of defendants." *Jackson*, 750 F.2d at 1330.

Taking issue with the decision to certify the question to the state court, the dissent observed that "[a] state seeking to protect its own citizens can only shape its law to maximize the recovery of its own early plaintiffs, so that at least those individuals will not be impeded in the legal scramble for a share of insufficient assets." *Id.* The situation has only worsened since the time of the *Jackson* opinions, and a panel of that same Court in 1990 conceded its "misgivings" over awarding punitive damages in asbestos cases, but found itself shackled by binding precedent. *King v. Armstrong World Indus.*, 906 F.2d 1022, 1033 (5th Cir. 1990).

As the *Jackson* dissent commented and as we discussed in *In re School Asbestos Litigation*, 789 F.2d at 1001, parochial concerns tend to influence the decision to make punitive damages available in cases of this nature. That approach was apparent, for example, in *Fischer v. Johns-Manville Corp.*, 512 A.2d 466 (N.J. 1986). In discussing the suggestion that a limitation on punitive awards be imposed, the *Fischer* Court said: "Such a cap would be ineffective unless applied uniformly. To adopt such a cap in New Jersey would be to deprive our citizens of punitive damages without the concomitant benefit of assuring the availability of compensatory damages for later plaintiffs. This we decline to do." *Id.* at 478. What that opinion failed to acknowledge was that giving windfall punitive awards to

early plaintiffs poses the likely prospect that some future New Jersey plaintiffs will be unable to recover compensatory damages for their injuries.

The New Jersey Supreme Court also stated that it failed "to see the distinction, in the case of *Johns-Manville* [before its bankruptcy], between the effect of compensatory damages and that of punitive damages." *Id.* at 477. To some extent, the Court was correct. Every dollar expended on punitive awards, as well as those expended in compensatory damages, will diminish, eventually to the point of exhaustion, resources available for paying future plaintiffs' claims. There is, however, an important distinction. Compensatory damages are a remedy for injuries suffered. Punitive awards are not. A dissenting justice in *Fischer* posed an apt rhetorical question: "But why, for example, should a few Dalkon Shield users receive several millions in punitive-damages awards, while others receive nothing from the bankrupt A. H. Robins Co.?" *Id.* at 488 n.3 (O'Hern, J., dissenting).

Unquestionably, a national solution is needed. Despite the deteriorating situation, Congress has declined to act and class actions are an inadequate remedy. In the meantime, the drain on available resources continues. It is time — perhaps past due — to stop the hemorrhaging so as to protect future claimants.

The parochial concerns that have influenced some states to allow punitive damages would justify the majority's decision here. But at some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism.[9] It is judicial paralysis, not activism, that is the problem in this area. As

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9. In his dissertation prepared for the LLM program for Judges at the University of Virginia Law School, Judge Surrick concludes that punitive damages have no place in asbestos litigation. He says that balancing social and economic consequences mandates that conclusion. He also refers to "judge-made doctrines" of punitive damages in asbestos litigation and says that appellate courts should rise above parochial considerations. "When the reasons for a rule no longer exist, the rule should be abolished." Honorable R. Barclay Surrick, *Punitive Damages and Asbestos Litigation in Pennsylvania: Punishment or Annihilation?*, 87 Dick. L. Rev. 265, 301 (1983).

we said in *Frilette v. Kimberlin*, 508 F.2d 205, 212 (3d Cir. 1974) (en banc), it is not necessary to wait for legislative action when the error was judge made and it can be corrected in the same fashion. "We cannot escape the fact that what has been done is in the nature of what, in the words of Chief Justice Hughes, might be called a 'self-inflicted wound.'" *Id.*

I am persuaded that, at this point, the available resources of asbestos manufacturers will be exhausted before all deserving claimants have received compensatory damages.[10] Predictions of future events, of course, always carry some risk of error. In this instance, however, the storm warnings are too foreboding to be brushed aside. Absolute certainty likely will appear only after disaster has struck — when the time for effective anticipatory action has vanished. If there is to be error in forecasting, I would prefer that it be in favor of redress for future claimants, rather than largesse for those who have received adequate relief.

The cruel reality underlying the issue in this case cannot be ignored. As Chief Judge Clark said in the *Jackson* case: "This seminal case concerns much more than [an] individual claim. . . . We know better. Our dockets tell us so . . . ." 781 F.2d at 416. It is already late in the day, but we have an obligation to take what steps we can.

It should require no extended discussion to conclude that in establishing a proper priority, compensation for victims should rank first. Next must come necessary but

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10. As Judge Weinstein has concluded: "overhanging th[e] massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of insolvency . . . ." *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 751; *see also* Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. Ill. L. Rev. 269, 290 ("Our view is that from the beginning mass torts should be treated similarly to a bankruptcy proceeding. No matter how financially healthy the defendants in these huge cases, the sheer number of present and future victims means that we are ultimately dealing with a limited compensation fund.")

reasonable administrative costs attributable to compensation.[11] Far down the list — if not at the very bottom — should come punitive awards, which are by definition over and above adequate compensation. Exemplary awards are an element that can equitably and easily be eliminated.

Under current conditions, even if the purposes of punishment and deterrence were served, it is fanciful to believe that such factors are worthy of consideration in assessing priorities to limited funds. In this context, the benefits of punitive awards are outweighed by their costs to society. *Cf.* David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 724-25, 737-39 (1989).[12] Punishment and deterrence cannot justify extra-compensatory awards when they penalize future claimants by depleting available funds.

Society's interest in protecting future claimants demands that present plaintiffs — both those who go to trial and those who settle — forego the "bonus" offered by punitive damage verdicts or high settlements achieved by their threat. Courts must recognize that the public interest outweighs parochial concerns in having citizens within their jurisdictions "get theirs" now. Such a selfish approach, after all, is unjust, not only to future claimants in other parts of the country, but within the courts' own jurisdictions as well.[13]

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11. The high transaction costs of asbestos cases that diminish the pool of available assets have been authoritatively documented. They are also a very serious problem, but one that cannot be addressed here.

12. Professor Owen, whose endorsement of punitive damages in products liability cases has been widely cited, *see* David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1325 (1976), stated: "[O]nce the bankruptcy of the defendant manufacturer appears to be a real and imminent possibility, punitive damages should no longer be available at all." It is interesting that in a later law review article, Professor Owen substantially modified his endorsement of punitive damages and cautioned against excessive awards. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1 (1982).

13. It is worth noting that two trial courts have recognized that punitive awards present a danger that available funds will be inadequate to pay compensatory damages.

I have no doubt that this Court has the power to prohibit punitive awards in asbestos cases within the Virgin Islands and I am convinced that it has an obligation to do so in order to protect the interests of those whose claims for compensation will be jeopardized.

II.

DUE PROCESS

Some of the same considerations that are important in deciding whether punitive awards are appropriate under local law also play a part in determining whether the assessment of such sums violates due process.

Although plaintiff here asserts that Owens-Corning failed to provide a sufficient basis for a ruling on due process, the record establishes that pretrial motions to dismiss punitive damage claims were denied by the district court. After the jury had begun its deliberations on punitive damages in the bifurcated trial, the defense renewed its contention that they would be unconstitutional because of previous awards. Counsel stated that four punitive awards had been entered

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Judge Marshal A. Levin of the Maryland Circuit Court of Baltimore City ordered that payment of punitive awards for approximately 8,500 plaintiffs in a consolidated proceeding be deferred until compensatory damages have been satisfied. *Abate v. A.C. & S., Inc.*, No. 89236704, slip op. at 26 (Md. Cir. Ct. Baltimore City Dec. 9, 1992).

In a somewhat similar action, Judge Charles Weiner of the United States District Court for the Eastern District of Pennsylvania (to whom the multi-district panel has assigned some 30,000 federal asbestos cases) severs punitive damages claims from the compensatory ones. In ordering cases back to transferor courts for trial, Judge Weiner provides that "the issue of punitive damages must be resolved at a further date." *E.g., In re Asbestos Prods. Liab. Litig. (No. VI)*, No. MDL 875, slip op. at 2 (E.D. Pa. June 8, 1993) (order relating to No. 92-6377 from the Southern District of New York).

In reality, it is quite likely that in many instances the delay will result in payment of no punitive damages, or at a time so far in the future that many of the plaintiffs will no longer be alive.

against Owens-Corning, but indicated that there might be others as well.

The district court concluded that a punitive award would not be unconstitutional because "even in view of [defendant's] negative net worth [the amount] is certainly not enough to sting the company . . . [a]nd it's not unconstitutional because your client to this date has been subjected to a huge burden with respect to punitive damages."

In post-trial proceedings, the district court directed both parties to furnish information on punitive awards in other asbestos cases during the preceding two years. In response, plaintiff listed thirty-eight cases — two which included punitive awards against Owens-Corning of $4,150,000 and $5,000,000. In his statement, plaintiff admitted that "other juries had reached the same conclusion regarding OCF's conduct and awarded punitive damages accordingly."

Defendant filed an extensive compilation, and an analysis of the thirty-eight cases listed by plaintiff, together with an affidavit detailing the punitive awards against Owens-Corning to that date. In its submission, defendant listed $19,975,000 awarded against it in punitive damages.

On this record, defendant adequately preserved its objections asserting a denial of due process.

The Supreme Court has indicated that punitive awards may violate substantive due process. In *TXO*, 61 U.S.L.W. at 4771, the Court concluded that as to the verdict at issue there, "we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow." In *Haslip*, 499 U.S. at 35 n.11, the Court noted that punitive awards may be required to comport with "procedural and substantive [due process] protections."

Due process concerns are present in two aspects that have a correlation to the criminal field — proportionality and repetitiveness. The Supreme Court has made it clear that the Excessive Fines Clause of the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment are not directly applicable to suits between private litigants. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S.

257, 260 (1989); *United States v. Halper*, 490 U.S. 435, 451 (1989); *see also Hansen v. Johns-Manville Prod.*, 734 F.2d 1036, 1042 (5th Cir. 1984). Nevertheless, the analogy between "punishment" in the criminal field and exemplary awards in civil litigation is strong enough that the rationale in the former area is useful in analyzing the scope of the latter.

As one commentator remarked, "[T]o punish the guilty beyond their guilt is not different from punishment of the innocent, and it cannot be done in a manner consistent with ordinary notions of justice." Dan B. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 854 (1989). "By definition, punitive damages are based upon the degree of defendant's culpability." *Massachusetts Bonding & Ins. v. United States*, 352 U.S. 128, 133 (1956).

Neither *TXO* nor *Haslip* provide much guidance in the mass tort area because the wrongful conduct in each case affected only the other party to the suit. Obviously, such limited disputes are quite unlike asbestos litigation, where literally thousands of plaintiffs have brought suits against a relatively small number of manufacturers and where punitive awards are sought on essentially the same basis — an alleged failure to warn.

As a further complication in the asbestos field, sheer volume, varying state laws, and concerns for future, not-yet-identified, claimants make consolidation of all the asbestos claims impossible. Legal scholars have discussed this problem and proposed legislation to permit class actions and similar procedures to remedy the problem.[14]

Some commentators suggest that the first award of punitive damages arising from a course of conduct should preempt all subsequent punitive claims. Others point to the asserted unfairness of permitting early plaintiffs to receive all of the punitive damages that can rationally be

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14. Dennis N. Jones, S. Brett Sutton & Barbara D. Greenwald, *supra*, at 23-32; David G. Owen, *supra*, 74 Mich. L. Rev. at 1325; Richard A. Seltzer, *supra*, at 83-91; Comment, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797, 1800-08 (1979).

sustained, thus depriving later claimants of a similar opportunity. Still others suggest that juries in later cases should be fully informed as to all of the punitive damages that have been previously awarded. Asbestos defendants object to this proposal because such information might prejudice jurors, convincing them that punitive damages should be awarded in all cases.

Each of those proposals present problems of their own. The formidable complications unique to the mass tort field have led most courts that have been presented with due process challenges to deflect the attack by deciding each case on a subsidiary factual or procedural issue and deferring to a later date the thorny question of due process. *See, e.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1287-88 (2d Cir. 1990) (inadequate record); *Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989) (same).

Even the few opinions that have thoughtfully discussed due process objections have been deterred by governing law in their jurisdiction. For instance, in *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, *vacated*, 718 F. Supp. 1233 (D. N.J. 1989), the court was troubled by the serial imposition of punitive damages in asbestos cases, but ultimately decided that it would be inequitable to deny them to one plaintiff when other plaintiffs in the same and other state jurisdictions would nevertheless still have the opportunity to seek such awards.[15] That approach is understandable, but undesirable nevertheless. The rationale is faulty because it skews the scales by placing the emphasis on the wrong party.

The earlier part of this opinion weighed the rights of future claimants to compensation against the opportunity of current claimants to receive windfalls. That balancing did not rest on a concern for asbestos defendants, but rather was based on the assumption that they owed fair and

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15. *See also* Jim Fieweger, Note, *The Need for Reform of Punitive Damages in Mass Tort Litigation: Juzwin v. Amtorg Trading Corp.*, 39 DePaul L. Rev. 775 (1990); N. Todd Leishman, Note, *Juzwin v. Amtorg Trading Corp.: Toward Due Process Limitations on Multiple Awards of Punitive Damages in Mass Tort Litigation*, 1990 Utah L. Rev. 439.

reasonable compensation based on either negligence or strict liability — even to the extent of insolvency.

However, because punitive awards are windfalls and not compensation, courts should place less emphasis on plaintiffs' rights when evaluating due process arguments. Plaintiffs' entitlements are, after all, met by compensatory damages.[16] Instead, when considering the substantive due process limits on punitive awards, a court's analysis should focus on the defendants. *See* Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 292 (1983) ("As courts have uniformly held, no plaintiff has a right to punitive damages: the purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff.").

If it were possible for a single jury to consider the extent of harm as well as the number of victims and then factor that data into a single punitive award against an asbestos manufacturer, there would be no basis for imposing punishment thereafter. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 728 ("In theory, . . . when a plaintiff recovers punitive damages against a defendant, that represents a finding by the jury that the defendant was sufficiently punished for the wrongful conduct. There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."). The difficulty is that in asbestos litigation, no single jury can assess a punitive damage award that includes all victims. Thus, courts must confront the unavoidable and undeniable fact that defendants are being punished over and over again for the same general course of conduct. *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-41 (2d Cir. 1967).

Although *Halper*, 490 U.S. at 451, found that the "protections of the Double Jeopardy Clause are not triggered by litigation between private parties," that opinion

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16. Arguments can be made for distributing punitive awards among all who suffered from the defendants' conduct — but that proposition is irrelevant in determining that, at some point, due process demands an end to punishment.

uses language that is quite instructive in a due process analysis. As the Court observed:

> "It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law .... Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment."

Id. at 447-48 (citations omitted). Those goals are retribution and deterrence. *Id.* at 448; *see also Austin v. United States*, 61 U.S.L.W. 4811, 4813 (U.S. June 28, 1993) (question is not whether statutory forfeiture is "civil or criminal, but rather whether it is punishment").

Because punitive damage awards serve the same purposes as criminal sanctions, Courts of Appeals concede that, at some point, multiple punitive awards in mass tort cases violate due process. *See, e.g., Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281-82 (2d Cir. 1990); *Johnson*, 899 F.2d at 1287-88; *Racich*, 887 F.2d at 398 ("We agree that the multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns, in the absence of any limiting principle."); *cf. In re School Asbestos Litig.*, 789 F.2d at 1004-05. Those opinions, however, have not extensively explored the dimensions of this constitutional argument.

Initially, it is important to note the wrongful conduct charged to asbestos manufacturers — a failure to warn of the dangerous characteristics of the substance for years after those dangers became known to the industry. We also observe that asbestos was taken off the market in 1971. Punitive awards that are made today, therefore, punish corporate defendants over and over again for transgressions that occurred thirty to sixty years ago. Payment of those awards not only jeopardizes the ability to provide compensation for future plaintiffs, but also, by forcing companies into bankruptcy, injures employees, customers,

and trade creditors who took no part in, and had no knowledge of, the wrong doing.

Moreover, unlike the situation in *TXO*, these cases do not involve a scenario in which the incumbent corporate officials personally participated in fraudulent and malicious activity. Punitive awards in asbestos cases usually do not punish the individuals who were responsible for the offensive conduct. *See* American Law Inst., *supra*, at 254-55. Thus, in this field, punishment is not only repetitive, but is inflicted on a vicarious basis. Basic notions of due process are offended by punishment that occurs over and over again as has happened in asbestos litigation.[17]

It may be argued that it would be unfair to disallow punitive awards at this point because current plaintiffs thus will not receive what earlier ones did. That is true. Nevertheless, such unevenness does not justify continued punishment of asbestos defendants. It would have been better had the matter of punitive damages been resolved at the beginning of the asbestos crisis, but it was not. Courts must grapple with the problem as it now exists. We are confronted with the alternative of permitting current plaintiffs to receive windfalls or stopping punishment that violates due process. The choice is obvious.

The other phase of substantive due process is proportionality. In its opinion, the *Haslip* majority noted that substantive due process "standards provide for a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter." 499 U.S. at 35. Similarly, in her dissent, Justice O'Connor recognized that whether an award is grossly excessive is an "important substantive due process concern." *Id.* at 92 (O'Connor, J., dissenting). We may take from *Haslip*, therefore, that a punitive award that is greater than reasonably necessary to punish and deter violates substantive due process. *See id.* at 31-32.

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17. *See* William W. Schwarzer, *Punishment Ad Absurdum*, 11 Cal. Law. 116 (1991) ("Surely allowing successive awards of punitive damages for the same conduct is offensive to the most basic notions of due process and to the spirit underlying the constitutional bar against double jeopardy. More important, it is poor public policy.").

Courts must also remember that punitive damages are intended to "sting," not to destroy. *See In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982). Indeed, in its early years the common law dictated that punitive awards should not be so large as to threaten the economic viability of defendants.

Because punitive damages are quasi-criminal, an analogy may be found in the early English practice of amercements. *See* John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 154-58 (1986). A wrongdoer could buy "peace" through the payment of a fine or amercement to the king. *Id.* at 154. Chapter 20 of the Magna Carta, 9 Hen. III, ch. 14 (1225), limited the king's power to impose fines, providing that a freeman shall be amerced "saving always his position; and a merchant in the same way, saving his trade; and a villein shall be amerced in the same way, saving his tillage." James Tait, *Studies in Magna Carta: Waynagium and Contenementum*, *in* 27 Eng. Hist. Rev. 720, 727 (Reginald L. Poole ed. 1912). Thus, the penalty inflicted should not, in any event, destroy the offender's means of making a living in his particular trade or calling. Magna Carta guaranteed not just bare survival, but continued productive economic viability.[18]

Having arrived at the principle that at some point further repetitive punitive damages are neither rational nor fair, the difficult question is how to determine when that point has been reached. Some assistance may be found in the approach that courts use to determine whether a traditional punitive award is excessive. Many of the same factors considered in the usual one-on-one case are helpful.

For example, in *Haslip*, 499 U.S. at 30-31, the Court

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18. John C. Jeffries, Jr., *supra*, at 154-58. The Amercements Clause of Magna Carta is discussed in detail in *Browning-Ferris*, 492 U.S. at 268-73. The majority recognized that the Amercements Clause limited abuses "by requiring that the amercement not be so large as to deprive him of his livelihood," but concluded that such history did not justify the application of the Eighth Amendment to punitive awards in private suits. *Id.*

approved Alabama's judicial review that included such considerations as:

(a) a reasonable relationship between the award and harm from defendant's conduct;

(b) the reprehensibility of defendant's conduct, its duration, defendant's awareness or concealment, and the existence and frequency of past misconduct;

(c) the profitability to defendant of the conduct;

(d) the financial position of defendant;

(e) all the costs of litigation;

(f) the imposition of criminal sanctions; and

(g) the existence of other civil awards against defendant for the same conduct.

In *TXO*, 61 U.S.L.W. at 4770, the plurality opinion relied on a general concern of reasonableness. In general, these considerations give the courts some basis on which to decide whether punitive damages should be permitted. However, other matters unique to mass torts — other punitive awards, the effect of those awards on current and future claimants for compensation, and the adverse effect on settlement of pending claims — must also enter into the calculus. After taking all these factors into account to determine that a defendant has been adequately deterred and punished, a court must strike down all subsequent punitive awards in order to preserve due process.

As a practical matter, we note that those manufacturers that have become bankrupt may have already escaped from the burden of punitive damages.[19] To the extent, however,

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19. A punitive award is dischargeable in bankruptcy unless a plaintiff can show that the bankrupt maliciously or willfully caused the plaintiff's injury. 11 U.S.C. § 523(6). In strict liability cases, this standard is generally not met. 1 James D. Ghiardi & John J. Kircher, Punitive Damages: Law and Practice § 9.19 (1983). Moreover, even if met, bankruptcy courts may exercise their equitable powers to deny such damages. *See In re A.H. Robins Co.*, 89 B.R. 555 (E.D. Va. 1988) (disallowing punitive damages because they would frustrate a successful reorganization of the company in this Dalkon Shield case).

that liability for exemplary awards may be joint and several in some jurisdictions, the inability of one defendant to pay punitives imposes an additional burden on those still solvent.

The amount of awards returned against Owens-Corning is more than enough for punishment. Alth ugh some verdicts may have been reduced on appeal and others compromised in later settlement agreements, that diminution is no doubt more than offset by the amount other settlements have been inflated because of the threat of punitive damages.

The fact that this company concedes that it would not be driven into bankruptcy by the punitive damage award here does not moot due process objections. If bankruptcy is the test, then due process relief will always come too late. In this case, punitive awards already assessed against Owens-Corning equal a substantial portion of the company's total Kaylo sales. The sum of compensatory awards, punitive damages, and litigation expenses dwarf any profits.

Owens-Corning has been able to remain solvent by producing goods not related to its ill-fated venture into asbestos products.[20] That fact should have no bearing on whether defendant should be punished more than a company whose activities were limited to asbestos and has become bankrupt. Repetitious punishment should not depend on the wealth or poverty of the offender. Due process is the right of every citizen, corporate or individual, wealthy or impoverished. Moreover, and perhaps more importantly, although the case before us only involves one defendant, the holding will apply to other asbestos litigation within this circuit.

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20. The ALI Reporters Study calling for punitive damages reform notes that corporate wealth is typically spread among various corporate subsidiaries. Thus, it often is only an accident of the corporate structure that places this wealth in the hands of the particular defendant entity. American Law Inst., *supra*, at 254; *see* Victor E. Schwartz and Mark A. Behrens, *The American Law Institute Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 San Diego L. Rev. (Fall 1993).

I am persuaded that the punitive damages award against Owens-Corning should be stricken. The amounts awarded in prior litigation have been more than adequate to meet the needs of punishment and deterrence. Thus, permitting an award to the plaintiff serves no rational purpose.

I dissent.

Judge Greenberg, Judge Hutchinson, and Judge Scirica join in this dissent.

BECKER, *Circuit Judge*, dissenting.

Judge Weis has powerfully demonstrated that the repetitive imposition of punitive damages upon Owens-Corning for failure to warn in connection with the same series of acts (the sale of asbestos products) has, in terms of the legal justification for punitive damages, become so irrational as to offend the due process clause of the Fourteenth Amendment. I therefore join in Part II of his dissent. I note in this regard that the majority's slicing of the punitive damages award from $2 million to $1 million in a single sentence on the grounds that "the district court gave insufficient consideration to the effects of successive punitive awards in asbestos litigation" is a testament to the force of Judge Weis's argument.

I do not, however, join in Part I of Judge Weis's dissent. The majority has convincingly demonstrated why we should not, in the exercise of our powers as the final expositors of Virgin Islands law, declare the repetitive imposition of punitive damages unavailable as a matter of Virgin Islands common law.

I respectfully dissent.

A True Copy:
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Clerk of the United States Court of Appeals
for the Third Circuit

Filed July 27, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-3837

WILLIAM DUNN

HESS OIL VIRGIN ISLANDS CORP.

v.

HOVIC; AMERADA HESS CORP.; KEENE CORPORATION

v.

THE LITWIN CORPORATION; LITWIN PANAMERICAN;
BORINQUEN INSULATION CO.

Owens-Corning Fiberglas Corporation,

Appellant

On Appeal from the
District Court for the Virgin Islands (St. Croix)

(D.C. Civil No. 87-00238)

Argued April 22, 1992

Before: SLOVITER, *Chief Judge*, MANSMANN and WEIS,
Circuit Judges

(Opinion filed: July 27, 1993)

Barry S. Simon (Argued)
Paul Mogin
Williams & Connolly
Washington, D.C. 20005
Attorneys for Appellant

Joel H. Holt (Argued)
Christiansted, VI 00820

Paul S. Minor
Minor & Guice
Biloxi, Mississippi 39533
Attorneys for Appellee

OPINION OF THE COURT

SLOVITER, *Chief Judge.*

Preliminary Note

On April 22, 1992 a panel of this court heard argument on the appeal of Owens-Corning Fiberglas Corporation (OCF) from the judgment of the district court awarding William Dunn $500,000 in compensatory damages for asbestos-related injury and $2 million in punitive damages. The opinion of the panel, affirming the district court's award of compensatory damages and ordering a remittitur of the punitive damages award to $1 million, was filed on September 18, 1992.

Thereafter, OCF filed a petition for rehearing in banc. On October 8, 1992, the court granted the petition and vacated the opinion of the panel. However, the petition was directed only to the punitive damages award and the court subsequently directed counsel to limit their arguments at the rehearing in banc to that issue. Accordingly, the court in banc has amended its October 8, 1992 order to the extent that it vacated the panel opinion in its entirety, and the panel hereby reinstates the portion of its earlier opinion addressing the compensatory damages and evidentiary issues raised by OCF with only minor editorial changes. A separate opinion of the court in banc will be issued limited to the punitive damages award.

I.

PROCEDURAL POSTURE

In 1987 William Dunn, a former pipe installer at Hess Oil Virgin Islands Corporation (HOVIC), filed this action against OCF as well as other manufacturers of asbestos-containing products, alleging personal injuries caused by exposure to asbestos. Following a trial in which liability and compensatory damages were determined before the issue of punitive damages, the jury awarded Dunn $1.3 million in compensatory damages and $25 million in punitive damages against the sole remaining defendant, OCF, the distributor and later manufacturer of Kaylo, an asbestos-containing pipecovering.

OCF filed post-trial motions pursuant to Federal Rules of Civil Procedure 50(b) and 59 requesting a Judgment Notwithstanding the Verdict or, in the alternative, a new trial. The district court denied the motion for JNOV, but conditioned the denial of the motion for a new trial on Dunn's acceptance of a remittitur of the compensatory award to $500,000 and the punitive award to $2 million. *Dunn v. Owens-Corning Fiberglas*, 774 F. Supp. 929, 951-52 (D.V.I. 1991). Dunn accepted the remittitur, and OCF appeals. We have jurisdiction under 28 U.S.C. § 1291 (1988).

II.

STANDARD OF REVIEW

In ruling on a motion for JNOV, the district court must view the evidence, together with all reasonable inferences therefrom, in the light most favorable to the verdict winner. *Rolondo v. Keene Corp.*, 956 F.2d 436, 438 (3d Cir. 1992). We apply the same standard on appeal as the district court, *id.*, and will affirm the denial of the motion "unless the record is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." *Dawson v. Chrysler Corp.*, 630 F.2d 950, 959 (3d Cir. 1980) (internal quotations omitted), *cert. denied*, 450 U.S. 959 (1981).

We review the denial of a motion for a new trial for abuse of discretion, *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 290 (3d Cir.), *cert. denied*, 112 S. Ct. 373 (1991), and note that "the district court ought to grant a new trial on the basis that the verdict was against the weight of the evidence only where a miscarriage of justice would result if the verdict were to stand." *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1352 (3d Cir. 1991). In addition, "we may disturb the district court's determination with respect to a remittitur only for abuse of discretion, and reverse and grant a new trial only if the verdict is so grossly excessive as to shock the judicial conscience." *Gumbs v. Pueblo Int'l, Inc.*, 823 F.2d 768, 771 (3d Cir. 1987) (internal quotations omitted).

III.

DISCUSSION

Rather than focus its appeal on liability, OCF raises numerous issues going to damages. We address in subpart A the compensatory damages issues and in subpart B the evidentiary issues, which implicate both compensatory and punitive damages.

A.

COMPENSATORY DAMAGES

1. *Sufficiency of the Evidence*

From the evidence presented at trial, the jury could reasonably have concluded the following. In 1950 Dunn went to work as a pipe installer's helper for Dow Chemical in Texas. App. at 846-47. After working in various places in the United States and the Caribbean, Dunn began working at the Hess Oil refinery in St. Croix, Virgin Islands in 1966 as a pipe installer. App. at 859-64. He testified that as a result of his duties, which often required cutting, sawing or pounding of asbestos-containing insulation, he was covered from head to toe in dust from early morning until he left work. App. at 868-69. Dunn identified OCF's Kaylo as the

asbestos-containing insulation product he used most.[1] App. at 870.

Beginning in the mid-1980s, Dunn began to experience shortness of breath and weight loss. App. at 878-79, 888. He was diagnosed as suffering from "a lung condition . . . caused by asbestos." App. at 879. Prior to that time Dunn enjoyed a variety of athletic activities, including running, swimming, biking, and weight lifting. App. at 876. He claims that because of his lung disease, he can no longer engage in the athletic activities he enjoyed previously. App. at 889. Dunn testified about his great fear of contracting cancer in the future and his depression at seeing long-time friends die of asbestos-related disease. App. at 889-92.

Dunn asked for compensatory damages for present and future pain and suffering, including compensation for his fear of contracting cancer. OCF contends that Dunn did not adduce enough evidence at trial to show that he suffers from compensable injury. In particular, OCF claims that under the American Thoracic Society standards for diagnosing asbestosis, the evidence presented at trial demonstrates that Dunn does not exhibit the conditions necessary for a diagnosis of asbestosis.

Under the Virgin Islands Code, in the absence of local law to the contrary, the Restatements of the law approved by the American Law Institute control. V.I. Code Ann. tit. 1, § 4 (1967); *see Berroyer v. Hertz*, 672 F.2d 334, 340 (3d Cir. 1982). OCF notes that Restatement (Second) of Torts sections 388 and 402A make "harm" an essential element of claims for negligence and strict liability. However, section 7(2) defines "harm" as "the existence of loss or detriment in fact of any kind to a person resulting from any cause." Restatement (Second) of Torts § 7(2) (1965). Comment b explains that "'[h]arm' implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing. . . . In so far as these acts or conditions are detrimental to him, he suffers harm." *Id.* cmt. b.

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1. The parties stipulated that from 1953 through 1972, Kaylo contained an average of 15 percent asbestos. App. at 963, 1068.

It is undisputed that Dunn has extensive pleural thickening on the exterior of his lungs. *See* App. at 661-62, 762-63. OCF nevertheless argues that the presence of pleural plaques does not constitute compensable injury, citing *Purjet v. Hess Oil Virgin Islands Corp.*, 22 V.I. 147, 149 (D.V.I. 1986), for the proposition that Dunn must prove "[a]ctual injury or damage" to recover. In that case, plaintiffs, neither of whom suffered from any asbestos-related condition, brought a suit seeking, *inter alia*, damages for enhanced risk of developing asbestos-related diseases. In granting summary judgment for the defendants, the district court held that under Virgin Islands law, "a tort claim will not lie in the absence of a demonstrable injury [and] mere exposure to asbestos is insufficient to state a cause of action." *Id.* at 154; *see also Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.) (for purposes of F.E.L.A. claim, "manifest injury [is] a necessary element of an asbestos-related tort action"), *cert. denied*, 474 U.S. 864 (1985).

We need not decide in this case whether the mere presence of pleural plaques constitutes the "harm" necessary to recover damages for tort under the Restatement. We note that more recent cases applying the law of states within this circuit have held that it is. Thus, in *Marinari v. Asbestos Corp.*, No. 1816, 1992 Pa. Super. LEXIS 2193 (July 20, 1992), the Pennsylvania Superior Court, sitting in banc, held that "pleural thickening, even when asymptomatic, is an injury which gives rise to a cause of action."[2] *Id.* at *24.

Two medical experts testified on Dunn's behalf. Dr. David Egilman, who is board certified in internal and occupational medicine with a specialty in occupational lung disease, *see* App. at 156, stated that Dunn had "the exact injuries that you would expect if someone was injured from breathing in the asbestos." App. at 164. He also stated that he was

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2. In light of the evidence in this case we need not decide the effect of *Marinari* on our earlier decision in Howell v. Celotex Corp., 904 F.2d 3, 5 (3d Cir. 1990), that under Pennsylvania law the determination of whether pleural thickening constitutes compensable injury is for the trier of fact.

"certain that [Dunn] has asbestos-related lung disease, both in the lung tissue and around the lung," and concluded that Dunn suffers from asbestosis. App. at 297.

Dunn's other expert witness, Dr. David Kern, also certified in occupational and internal medicine, concurred in this diagnosis, stating that Dunn "definitely did have asbestosis." App. at 666. Both experts testified that when they examined Dunn's lungs they heard rales, a velcro-like sound indicative of asbestosis. App. at 294-95, 680. These observations mirrored that of the first doctor to examine Dunn in 1985. App. at 294.

Dr. William Cole, OCF's radiology expert, testified that the outer lining of Dunn's lungs displayed pleural plaques and that asbestos exposure was probably the cause. App. at 762-63, 765. This same conclusion was reached by Dr. Kern who stated that Dunn's pleural plaques were massive. App. at 662. Dr. Kern also testified that pleural plaques "have an effect on lung function." App. at 661. Dr. Cole agreed that in an advanced stage, pleural plaques could affect lung functioning. App. at 818.

Thus, in this case, there is evidence, if believed, that Dunn suffers from more than mere pleural plaques. In the first place, Dunn's plaques "are massive." App. at 662. Dunn "ha[s] both scarring of the lining of the lung, both in front and on the muscle that's under the lung. And he also has scarring in the lung tissue." App. at 272. In the second place, and more important, Dunn's experts testified that as a result of his exposure to asbestos, Dunn has reduced lung capacity. Tests performed demonstrated that Dunn's lung capacity decreased by about 20% between 1985 and 1989 and that a further decrease occurred between 1989 and 1990. App. at 277-78. Dr. Egilman testified that Dunn's disease was progressing at a rapid rate and that his total lung capacity would continue to decrease. App. at 299. According to both Drs. Egilman and Kern, such a decrease is abnormal and consistent with a diagnosis of asbestosis. App. at 279-80, 668-70.

Furthermore, in 1989, a small nodule was discovered on Dunn's lower left lung. App. at 288-89, 890. Although Dr. Egilman did not believe it was malignant at that time, he

recommended that it be examined and x-rayed every three to five months. App. at 290-91. Finally, Dr. Egilman testified that Dunn had a greater than fifty percent chance of dying from an asbestos-related disease and that Dunn's fear of contracting cancer was reasonable. App. at 300.

While OCF did present colorable evidence tending to contradict the conclusions of Dunn's experts, it was not so overwhelming that the jury could not reasonably conclude that Dunn suffers from mild asbestosis which is likely to worsen. As the district court properly noted, "[i]t was well within the jury's province to decide to credit the testimony of plaintiff's doctors while discounting that of defendant's." *Dunn*, 774 F. Supp. at 937. Dunn's shortness of breath and inability to engage in the extent of physical activity he enjoyed previously are detrimental effects that constitute sufficient "loss or detriment" to justify an award of compensatory damages.

In *Herber v. Johns-Manville Corp.*, 785 F.2d 79 (3d Cir. 1986), a case brought by a plaintiff with pleural thickening, we ruled that under New Jersey law a plaintiff need only demonstrate "slight impact and injury ... to warrant recovery for emotional distress caused by fear." *Id.* at 85; *see Sullivan v. Combustion Eng'g*, 590 A.2d 681, 683 (N.J. Super. Ct. App. Div.) (citing *Herber* with approval), *cert. denied*, 598 A.2d 897 (N.J. 1991). Thus, even assuming Dunn does not suffer from asbestosis, the jury was free to conclude that notwithstanding OCF's evidence of Dunn's physical activity, the physical impact of Dunn's pleural plaques caused enough harm to warrant recovery, particularly when combined with the anxiety associated with the fear of cancer.[3] *See McCleary v. Armstrong World*

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3. In Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.) (in banc), *cert. denied*, 478 U.S. 1022 (1986), the court stated:

> [Plaintiff's] fear is plainly a present injury. It is a fear which he experiences every day and every night. It is a fear which is exacerbated each time he learns that another victim of asbestos has died of lung cancer. It is fear which, regardless of whether [plaintiff] actually gets cancer, will haunt him for the rest of his life.

Id. at 414 (footnote omitted). These words are equally applicable to Dunn.

Indus., Inc., 913 F.2d 257, 258 (5th Cir. 1990) (upholding under Texas law jury verdict in asbestos case where plaintiff suffered from "pleural fibrosis"); *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 468 (5th Cir. 1985) (accumulation of asbestos fibers in lungs sufficient injury under Texas law to support claim for fear of cancer).

2. *Excessiveness of the Remitted Compensatory Damages Award*

OCF asks this court for further remittitur of the district court's compensatory damages award, arguing that comparison to awards in similar cases and that lack of proof of special damages demonstrate the excessiveness of the remitted $500,000 compensatory award. Admittedly, $500,000 is generous, but it certainly is not the highest award of its kind, *see* App. at 1842, 1843, 1918, 1919, 1921, and does not shock our judicial conscience. Given our deferential scope of review, *see Gumbs*, 823 F.2d at 771, we conclude that the district court did not abuse its discretion in granting a remittitur to $500,000.[4]

B.

EVIDENTIARY ISSUES

1. *Testimony of Dunn's Expert Witness*

OCF argues that both the punitive and compensatory damages awards should be reversed because of the district court's evidentiary rulings under Federal Rule of Evidence 702.[5] This court reviews evidentiary rulings under Rule 702

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4. OCF argues that the size of the jury's initial $1.3 million award alone indicates passion or bias requiring a new trial. We disagree. Other juries have awarded such sums in similar cases, *see, e.g.*, App. at 1843 ($1.091 million awarded to plaintiff with asbestosis), and we find nothing in the record suggesting bias or prejudice.

5. This rule permits expert testimony, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Fed. R. Evid. 702. The commentary to this rule further explains: "The rule . . . recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts." *Id.* advisory committee's note.

for abuse of discretion. *See United States v. Leo*, 941 F.2d 181, 188 (3d Cir. 1991). We have explained that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Fed. R. Evid. 103(a); *see also Linkstrom v. Golden T. Farms*, 883 F.2d 269, 269 (3d Cir. 1989). We "will interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases." *Linkstrom*, 883 F.2d at 270; *see also American Technology Resources v. United States*, 893 F.2d 651, 655 (3d Cir.) (helpfulness standard interpreted broadly), *cert. denied*, 495 U.S. 933 (1990); *Breidor v. Sears, Roebuck & Co.*, 722 F.2d 1134, 1139 (3d Cir. 1984) ("[h]elpfulness is the touchstone of Rule 702").

We have previously expressed our view that in most cases "'[t]he jury is intelligent enough, aided by counsel, to ignore what is unhelpful in its deliberations,'" and noted that "'even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful.'" *In Re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 279 (3d Cir. 1983) (quoting 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶¶ 702[03], 702[02]), *rev'd on other grounds*, 475 U.S. 574 (1986). Finally, "to the extent that [OCF implies] that expressions of opinion on the ultimate fact in issue somehow impermissibly invade the province of the jury, it is inconsistent with the clear mandate of Rule 704." *Id.* (citation omitted).[6]

With these general principles in mind we address the issues raised by OCF. Dunn's principal expert witness, Dr. Egilman, is an M.D. who specializes in occupational medicine, i.e., the diagnosis and treatment of problems

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6. Rule 704 states in pertinent part:

> (a) Except as provided in subsection (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Fed. R. Evid. 704.

related to exposure to chemicals or other substances. App. at 131. The record reveals that Dr. Egilman takes referrals from companies to evaluate workers for illnesses that have occurred in the workplace. App. at 138. Dr. Egilman also conducts medical surveillance for companies to determine whether employees may be unduly exposed to toxic substances. App. at 139. Finally, he assists companies in analyzing information to determine whether or not substances used are harmful. When harmful substances are encountered, he instructs these companies as to

> how they should be properly handled, how workers should be educated about how to work with them so they won't get hurt, how warnings should be put on them and, in some cases, how the community physicians need to be informed.

App. at 139.

OCF claims that it was improper for Dr. Egilman to comment from his review of OCF's corporate records that OCF knew of the risks associated with exposure to asbestos. App. at 619. In light of our broad view of the "helpfulness" standard of Rule 702 and Dr. Egilman's particular experience in working directly with employers on issues of this general concern, we find no abuse of discretion as to the admission of this testimony under Rule 702.

OCF also challenges the admission of Dr. Egilman's testimony that

> based on what they [OCF] knew in the 40's and 50's, what they could have known and didn't know, they clearly did not meet the obligation of the standard that they knew and presented in this memo in 1941.

App. at 316.

The document referred to in Dr. Egilman's testimony is a 1941 OCF memorandum discussing whether "Fiberglas," then a new material, could be safely offered to industry. The OCF memorandum states that "those who are engaged in the manufacture of Fiberglas [sic] necessarily must have reassured themselves about the health aspects of the material before offering it for sale - for two reasons": first,

from a "humanitarian point of view, no company can afford to subject its employees to an unknown hazard" and second, from "a cold business view," because of concern about liability from users. App. at 2150A-E. The memo then discusses in depth research into the potential health hazards of fiberglass. Thus, Dr. Egilman's testimony expressed his own belief that OCF's conduct with respect to Kaylo did not meet its own self-imposed standard. Again, such commentary was not so inappropriate that we must hold that the district court abused its discretion in admitting this testimony.[7]

OCF also argues that it was improper for Dr. Egilman to state his conclusion that OCF was "the last company to put warnings" on its asbestos product and that those warnings did not appear on OCF materials until 1972. App. at 316. We agree with OCF. The jury did not need expert opinion to evaluate when OCF put warning labels on its Kaylo product.

Nevertheless, we conclude that such error was harmless. In particular, we note the testimony of Dunn, App. at 870-74, and his product identification witness, Mr. McComely Bully, App. at 631-32, that they did not recall seeing warning labels on the Kaylo boxes. In addition, OCF vigorously disputed Dr. Egilman's contention during the trial, *see* App. at 1235-39, and was not substantially prejudiced by this isolated remark.

The admissibility of particular expert testimony must be evaluated on review in the context of the entire case. For that reason, cases from other circuits on which OCF relies are not very helpful. Thus, for example, in *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989), cited by OCF, the court vacated the plaintiff's jury verdict in part because the expert testimony referred to facts that

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7. OCF also challenges Dunn's follow-up question, which asked whether that statement represented Dr. Egilman's "opinion to a reasonable medical probability as a health hazard consultant to industry." App. at 316. We view this question as nothing more that Dunn's attempt to underscore Dr. Egilman's qualifications. Even assuming that the question was improper, OCF did not object to it, and we do not find it so prejudicial as to constitute plain error.

were not in evidence and expressed his belief that the railroad was negligent, a patently improper statement. *See* Fed. R. Evid. 704 advisory committee notes (improper for expert to tell jury what result to reach). In contrast, OCF does not contend that Dr. Egilman referred to facts not in evidence. Moreover, we do not view Egilman's testimony as telling the jury the ultimate result to reach. *Cf. McGowan v. Cooper Indus., Inc.*, 863 F.2d 1266, 1272 (6th Cir. 1988) (approving district court's exclusion of expert's proposed testimony, which included conclusion that defendant was negligent). We will not reverse the verdict based on his testimony.

2. *The Hemeon Report*

OCF also contends that it was reversible error for the district court to admit the Asbestos Textile Institute's unpublished Hemeon Report. Specifically, OCF argues that the report was irrelevant under Federal Rule of Evidence 402 and that its prejudicial impact outweighed its probative value, warranting exclusion under Federal Rule of Evidence 403.[8]

Rulings under Rule 403 are reviewed for abuse of discretion, *see In Re Japanese Elec. Prods. Litig.*, 723 F.2d at 260, and, as we noted in our recent opinions, so are relevancy determinations under Rule 402. *See Pfeiffer v. Manion Center Area Sch. Dist.*, 917 F.2d 779, 781 (3d Cir. 1990); *Anderson v. Pittsburgh - Des Moines Corp.*, 893 F.2d 638, 641 (3d Cir. 1990).

The Hemeon Report questioned whether the then-generally acknowledged threshold limit value for levels of exposure to asbestos provided assurances of safety. Prior to this report, both the 1938 Dreessen study, prepared under the direction of the Surgeon General, and the 1946

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8. Under Rule 403,

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403.

Fleisher-Drinker study indicated that asbestosis would not result if asbestos dust were kept below 5 million particles per cubic foot of air. In 1946, the American Conference of Government Industrial Hygienists promulgated a threshold limit value of 5 million particles per cubic foot, which became widely accepted.

According to comment j of the Restatement section 402A, a manufacturer is liable for danger of which the manufacturer "has knowledge, or by application of reasonable, developed human skill and foresight, *should have knowledge.*" Restatement (Second) of Torts § 402A cmt. j (1965) (emphasis added). The comment to section 12 of the Restatement further states, in relevant part:

> "[S]hould know" implies that the actor owes another the duty of ascertaining the fact in question.... "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.

Id. at § 12 cmt. a. Dunn argued that the Hemeon report was admissible as evidence of what OCF should have known concerning the dangers associated with exposure to asbestos.

We find persuasive the analysis of the Second Circuit in *George v. Celotex Corp.*, 914 F.2d 26, 28-31 (2d Cir. 1990), where the court held that the district court did not abuse its discretion in admitting the Hemeon Report in an asbestos case against Celotex Corporation, a company which, like OCF, was not a member of the Asbestos Textile Institute. As in this case, there was no evidence on the record in *George* to indicate that Celotex ever had access to the report. In applying New York strict liability law, which "'generally follows the guidelines set forth in § 402A [of the Restatement],'" *id.* at 28 n.1 (quoting *Farina v. Niagara Mohawk Power Corp.*, 438 N.Y.S.2d 645, 646 (App. Div. 1981)), the court concluded that the report was relevant to show "what, if the jury so determined, Celotex reasonably should have known had it either conducted its own tests or been in contact with others in the industry ... that were

testing." *Id.* at 29. This rationale applies with equal strength here.

With respect to Celotex's argument that the prejudicial impact of the report outweighed its probative value, the court concluded that "[a]ny prejudice to Celotex was derived from the Hemeon Report's probative force and thus did not *unfairly* prejudice Celotex." *Id.* at 31. Once again, the same is true in this case. OCF argues that *George* is distinguishable because the court applied a "could have known" rather than a "should have known" standard in that case. However, we find no support for that subtle distinction in the *George* opinion.

OCF refers us to *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986) (applying Maryland law), and *Murphy v. Owens-Illinois, Inc.*, 779 F.2d 340 (6th Cir. 1985) (applying Tennessee law), cases in which the admissibility of the Hemeon report was not in issue. Instead, in these cases the courts merely upheld the respective district courts' exclusion of certain other documents and testimony.[9] Many of the asbestos cases are based on the same general body of industry documents, and the courts of appeals have tended to uphold the discretionary rulings, albeit different, of the trial courts. *Compare Lohrmann*, 782 F.2d at 1159-60 (holding that district court did not abuse its discretion in excluding documents gathered by Sumner Simpson, a former president of Raybestos Manhattan (now Raymark)), *with King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1025 (5th Cir. 1990) (no abuse of discretion in admitting Sumner Simpson papers as they are "relevant to the issue of what knowledge was scientifically discoverable by the industry as a whole at a certain time"), *cert. denied*, 111 S. Ct. 2236 (1991).

In light of the relevance of the Hemeon Report to what OCF "should have known" concerning the dangers associated with asbestos, and the absence of unfair prejudice to OCF, we find no abuse of discretion in its admission.

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9. The Hemeon Report contains no prejudicial exhortations of the type that characterized the testimony which the court of appeals found "highly prejudicial" in *Murphy*, 779 F.2d at 344.

IV.

CONCLUSION

For the foregoing reasons we will affirm the district court's order denying OCF's motion for Judgment NOV and remitting the compensatory damage award to $500,000.

WEIS, *Circuit Judge, dissenting.*

Concerns about a limited fund in some respects must color a court's consideration of compensatory damage verdicts as well as punitive damage awards. Just as imposition of inequitable exemplary damages diminish the assets that should be available for future claimants, so do excessive compensatory awards. A sense of fairness requires that trial and appellate court reviews of jury verdicts incorporate some necessarily rough equality of treatment for similarly injured individuals. Absolute equality is impossible, but in a broad range some attempt to temper aberrations is appropriate.

It is apparent that in this case the compensatory verdict of $1.3 million was grossly excessive. Recognizing that the trial judge reduced the award, I would nevertheless reduce it somewhat further.

The plaintiff specifically disavowed any claims for present or future wage losses. Indeed, he relied on these limitations on recovery in objecting successfully to defense cross-examination about his current employment.

The extent of the plaintiff's disability was hotly contested and the expert testimony sharply conflicting. As might be expected, the medical experts disagreed on the state of the plaintiff's health. Lacking medical backgrounds, the jurors, therefore, were left to choose between the differing evaluations prepared in anticipation of trial.

There was, however, documentary evidence in the case that was not consciously prepared for use at the trial. That evidence provides an assessment of the plaintiff's health that does not support the existence of the extensive injury on which the jury must have rested its large award.

The plaintiff was admitted for surgeries on his knee and shoulder during the spring of 1990, approximately six months before the trial began in November of 1990. The records of the surgeon and hospital in Texas are not concerned with whether the plaintiff was suffering with asbestosis, but they do give a revealing picture of Mr. Dunn's general health at the time.

The reports of the attending surgeon, Dr. Orth, describe the plaintiff's athletic activities including running, rowing, swimming, and weight lifting. The physician's notes comment that "[h]e has had to give up running recently because of swelling in his left knee" and would "like to have arthroscopic evaluation to see how the interior of his knee stood in arthritic fashion, and to determine what his future athletic activities should include."

Two months before the trial began, the doctor, in the last of his notes, wrote that the plaintiff had "been very busy in his work, doing a substantial amount of activities. He states that occasionally he will have to do some heavy work."

The impression gained from these rather extensive records is of a man who was, and intends to be, more physically active than most men of his age. That picture is not one of an individual who has such a substantial injury and disability as to justify the large verdict awarded here.

When this evidence is considered, along with testimony that the plaintiff was able to work, was gainfully employed at the time of trial, and made no claim for future loss of earnings, the excessiveness of the verdict becomes clear. On the record here, it seems to me that the trial judge's reduction of the $1.3 million verdict to $500,000 was not enough. I would reduce the verdict even further to $100,000, a sum which is substantially in excess of the average jury award or settlement figure for injuries of the nature that the plaintiff claims.

I, therefore, dissent from the majority's affirmance of the judgment entered by the trial judge on the compensatory award.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

William DUNN, Plaintiff,

v.

OWENS-CORNING FIBERGLAS,

Defendant.

Civ. No. 1987/238.

District Court, Virgin Islands,

D. St. Croix

Sept. 27, 1991.

OPINION

MOTLEY, District Judge, sitting by designation.

FACTS

In 1950, plaintiff, William Dunn, first went to work as a pipe installer's helper for Dow Chemical in Texas. A pipe installer performs the job of fitting insulation over pipes. This often requires cutting, sawing or pounding the insulation which creates dust. During plaintiff's career, this dust often contained asbestos. Plaintiff testified that Owens-Corning's Kaylo was the insulation that he used most frequently while performing these tasks and that the product contained no warning as to the dangers of asbestos. (Tr. v. IV at 128-29). Owens-Corning distributed Kaylo from 1948-1958 and actually bought the Kaylo producing plant in 1958.

In 1966, after working in various locales in the United States and Caribbean, plaintiff began working at the Hess Oil Refinery in St. Croix, Virgin Islands. (Tr. v. IV at 130). There plaintiff received, stored and fitted insulation. He testified that he was covered head to toe in dust from early in the morning until he left

work and that the principal insulation product he used was Owens-Corning's Kaylo. (Tr. v. IV at 135-136).

In the mid-1980s, Dunn began experiencing shortness of breath and was diagnosed as suffering from a lung condition caused by asbestosis. (Tr. v. IV at 145). Dunn had been a very athletic person who enjoyed running, swimming, biking and weight lifting (Tr. v. IV at 142) and he claimed that due to his lung disease, he was no longer able to work as an insulator or partake in the above athletic activities. Plaintiff alleged that the Kaylo product which Owens-Corning manufactured was a substantial cause of his lung problems.

The plaintiff, in his original complaint, had sued numerous manufacturers of asbestos. He settled, however, with a number of these defendants and defendants Celotex and Johns-Manville were bankrupt. Thus Owens-Corning was the only remaining defendant at trial. Plaintiff sought damages for present pain and suffering and future pain and suffering. He also asked for punitive damages.

The case was originally before Judge David O'Brien of this Court, but one week into trial the Judge became ill and subsequently died. The trial eventually took place over a two week period in November of 1990. After deliberation, the jury found defendant liable for $1.3 million in compensatory damages. The jury was then given an instruction regarding punitive damages and was once again sent out to deliberate. The jury returned a verdict for $25 million in punitive damages. Thus, in total, the jury awarded Dunn $26.3 million.

JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant, Owens-Corning, has moved this court for a Judgment Notwithstanding the Verdict (JNOV). The standard for a court to determine whether a JNOV should be granted or denied is whether "the record contains the minimum quantum of evidence from which a jury might reasonably afford relief." *Keith v. Truck Stops Corp.*, 909 F.2d 743, 745 (3d Cir. 1990) (citations omitted). *See also Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958, 961 (3d Cir. 1988); *Smollett v. Skayting Development Corp.*, 793 F.2d 547, 548 (3d Cir. 1986); *Denneny v. Siegel*, 407 F.2d 433, 439 (3d Cir. 1969). When there is insufficient evidence to support a jury's verdict, a court is required to grant a JNOV. *See National Controls Corp. v. National Semiconductor Corp.*, 833 F.2d 491 (3d Cir. 1987). In making such a determination, the court views the evidence in the light most favorable to the non-moving party. *Keith*, 909 F.2d at 747; *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L. Ed. 2d 770 (1977).

Defendant asks that in the event this court does not direct a JNOV, it grant a new trial. The standard for granting a new trial is lower than the standard for directing a JNOV. "A district court . . . may grant a new trial if required to prevent injustice or to correct a verdict that was against the weight of the evidence." *American Bearing Co. v. Litton Industries, Inc.*, 729 F.2d 943, 948 (3d Cir.), *cert. denied*, 469 U.S. 854, 105 S. Ct. 178, 83 L.Ed.2d 112 (1984). *See also Roebuck v. Drexel University*, 852 F.2d 715, 736 (3d Cir. 1988) (when verdict is contrary to the great weight of the evidence a new trial is necessary). "'The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court.'" *American Bearing*, 729

F.2d at 948 (citing *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 190-91, 66 L.Ed.2d 193 (1980) (per curiam)). A trial court, however, must ensure when deciding whether to grant a new trial that it "has not simply substituted its judgment of the facts and the credibility of the witnesses for those of the jury." *Shanno v. Magee Industrial Enterprises, Inc.*, 856 F.2d 562, 567 (3d Cir. 1988) (*citing Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir.) (en banc), *cert. denied*, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960)).

Defendant has raised numerous points which it believes warrant a new trial. This court will only address, in this opinion, those points which possess some merit.

SUFFICIENCY OF THE EVIDENCE

Defendant claims that plaintiff failed to produce evidence that the Kaylo product was a substantial contributing factor in plaintiff's injuries. More specifically, defendant claims that plaintiff failed to put forth any expert medical testimony stating that Kaylo was a substantial contributing cause of plaintiff's injury. Defendant relies for this proposition solely upon the case of *Burton v. Johns-Manville Corp.*, 613 F.Supp. 91 (W.D.Pa.1985). *Burton*, however, does not stand for the proposition that expert medical testimony is necessary to link a specific product to a plaintiff's injury.

In *Burton*, the plaintiff's doctor, on cross-examination, testified that he was unable to state the extent to which asbestos from plaintiff's work-site contributed to his injury. The doctor did state on direct examination that plaintiff died of an asbestos related disease, that this disease was caused by asbestos from his job-site

and elsewhere and that defendant's product caused asbestos dust to be released in the work place. The court firmly ruled that the evidence produced:

> was a sufficient basis for the jury to conclude under the instructions of the court on the law as it pertains to legal cause that defendant's defective product was a substantial contributing cause of decedent's disease and death. It was not necessary that plaintiff prove through expert opinion or otherwise that *defendant's* asbestos dust and fibers *independent* of other asbestos dust and fiber were a substantial contributing cause.

Id. at 94 (emphasis in original).

The *Burton* court did not insinuate that medical testimony is necessary to show proximate cause between an injury and defendant's particular product. Indeed, the court specifically held that testimony setting forth exactly how much one defendant's product contributes to the injury is not necessary and indeed may be even impossible. *Id.* In addition, the court was not attempting to set forth the minimum quantum of evidence necessary to establish proximate cause but was rather examining the evidence presented in that specific case.

Furthermore, and contrary to defendant's argument, in *Rocco v. Johns-Manville Corp.*, 754 F.2d 110, 113 (3d Cir.1985), the Third Circuit upheld the lower court's ruling that sufficient evidence supported the jury's finding that asbestos manufactured by Pittsburgh Corning was a factor causing plaintiff's injury. The Third Circuit stated that "[a]lthough the evidence was not overwhelming, there was enough for the jury to find that Unibestos, a product manufactured by Pittsburgh Corning, was used at the Ship-

yards where plaintiff had worked. The evidence consisted of several witnesses who testified that the product was manufactured by Pittsburgh Corning and that the product had been observed at the job sites." *Id.*

In *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir.), *cert. denied,* _____ U.S. _____ 111 S.Ct. 297, 112 L.Ed.2d 250 (1990), defendant contended that there was not enough evidence to show proximate cause between the injury and the product. The court found that testimony from co-workers and witnesses as to product identification was sufficient to sustain the verdict. *Id.* at 1286. *See also LaDuca v. Celotex Corp.*, No. 89-7684 (2d Cir. April 23, 1990) (available on Lexis) (evidence that plaintiff worked with defendant's asbestos product, among others, sufficient to find defendant's product proximate cause of asbestos injury).

Similarly, in *Migues v. Fibreboard Corp.* 662 F.2d 1182 (5th Cir. 1981), the defendant argued that there was no substantial evidence that plaintiff was exposed to its products and no evidence at all that its products were a producing cause of the disease. *Id.* at 1184. Yet the Fifth Circuit found that there was sufficient evidence for the verdict because plaintiff demonstrated that Nicolet was a manufacturer of asbestos-containing insulation and co-workers confirmed that plaintiff had worked with the product. Plaintiff also produced medical evidence that an asbestos related disease was the cause of death and that small quantities of asbestos could have produced the disease. *Id.* at 1185. *See also In re New York Asbestos Litigation,* 738 F.Supp. 66, 69 (E.D.N.Y. 1990) (causation established when witnesses testified they worked with defendant's product and medical expert testified of link between asbestos and injury).

Regarding Dunn's injuries, Dr. Egilman, plaintiff's expert in occupational medicine, stated that plaintiff had "the exact injuries that you would expect if someone was injured from breathing in the asbestos." (Tr. v. I at 87). The doctor further testified that he was "certain that [Dunn had] asbestos-related lung disease, both in the lung tissue and around the lung." (Tr. v. II at 40). He further stated that exposure to Kaylo dust constituted exposure to a toxic substance. (Tr. v. I at 149-50). Dr. Cole, defendant's medical expert in radiology, testified that plaintiff's lungs exhibited pleural plaques and that asbestos exposure was probably the cause. (Tr. v. IV at 28, 31). Dr. Egilman also testified that a study conducted in 1952 found that guinea pigs that inhaled dust from the Kaylo product developed both asbestosis and tuberculosis. (Tr. v. II at 54). The above testimony demonstrates that Dunn suffered from an asbestos-related disease.

For the purpose of the present trial, the parties have stipulated that from 1953-1972, Kaylo contained an average of 15 percent asbestos with a variance on occasion of plus or minus five percent. (Tr. v. IV at 229; Tr. v. V at 74). The parties further stipulated that in 1972, Owens-Corning began producing an asbestos free Kaylo product and ceased production of the asbestos-containing product. (Tr. v. IV it 230, 231). These stipulations clearly show that Owens-Corning produced a product containing asbestos.

Mr. Bully, who worked at the Hess Oil Refinery in St. Croix installing pipe insulation under the supervision of Dunn, testified that insulation workers were covered with dust at the end of a day. (Tr. v. III at 143-44, 146-47). Bully testified that from 1969-1972, the product most often used at Hess was Kaylo (Tr. v. III at 164). Dunn also testified that Kaylo was the product he used most frequently throughout his career. (Tr. v. IV at 152-53). The

above testimony is clear evidence that plaintiff worked with the defendant's product.

After careful examination, this court finds that there was enough evidence in the record from "which a reasonable jury, using the common sense lay wisdom from which juries are so often praised," *Roebuck v. Drexel University,* 852 F.2d 715, 727 (3d Cir. 1988), could infer that defendant's product was a substantial contributing cause of plaintiff's injury.

INJURY AND DAMAGES

Defendant argues that Dunn suffered no compensable injury from his contact with asbestos. It claims that plaintiff does not suffer from asbestosis and that pleural plaques is a non-compensable injury that does not manifest itself in any harmful manner. This court finds that there was sufficient evidence for the jury to find that plaintiff suffered from asbestosis and other lung impairments.

Defendant further argues that the jury's award of $1.3 million in compensatory damages for present and future pain and suffering far exceeds any damage that Dunn actually suffered or would suffer in the future. This court has the power to grant a new trial on the issue of damages if the size of the verdict is "so grossly excessive that it is not rationally related to any evidence adduced at trial." *Warner v. Lawrence,* 754 F.Supp. 449, 456 (D.V.I.1991). *See also Brown v. McBro Planning & Dev. Co.,* 660 F.Supp. 1333, 1337 (D.V.I.1987) (new trial warranted when jury award is the result of passion and prejudice).

The evidence presented was sufficient to sustain the verdict, but not the award of damages. Dr. Egilman, plaintiff's medical expert, testified that Dunn suffered from scarring of the lung tissue

and scarring of the tissue around the lung. As such, Dr. Egilman diagnosed plaintiff as suffering from asbestosis. (Tr. v. I at 83, 87). This scarring produced shortness of breath and prevented the plaintiff from engaging in numerous activities in which he had, in the past, participated. X-rays, a CAT scan and accompanying reports confirm that there is scarring of the lungs and pleural plaques. (Tr. v. I at 86-87; Tr. v. II at 16, 23, 38-39; Tr. v. III at 135).

Dr. Egilman further testified that he heard rales in the plaintiff's lungs, which is consistent with lung disease produced by exposure to asbestos. (Tr. v. II at 37-38). It was also his belief that Dunn's disease was progressing at a rapid rate (Tr. v. II at 42), and that his total lung capacity would continue to decrease. He testified that plaintiff had a greater than fifty percent chance of dying from an asbestos related disease and that Dunn had a reasonable fear of contracting cancer. (Tr. v. II at 43).

Tests performed on plaintiff demonstrate that his lung capacity decreased about a quarter between 1985 and 1989 and that a further decrease occurred between 1989 and 1990. (Tr. v. II at 20-21). Such a large decrease in lung capacity is abnormal and is consistent with the diagnosis of asbestosis. (Tr. v. II at 22-23, Tr. v. III at 187-88). In addition, a small nodule (an abnormal growth) was also discovered on plaintiff's left lower lung. (Tr. v. II at 31). Dr. Egilman, however, testified that he did not believe that the growth was malignant at the present time, but that it needed to be examined and x-rayed every three months. (Tr. v. II at 34).

Dr. Kern, an occupational medicine specialist, confirmed that plaintiff had massive pleural plaques (Tr. v. III at 180-81) and that such a condition affects lung function. (Tr. at *id.*). He testified that these plaques were the result of occupational exposure to

asbestos (Tr. v. III at 229) and that plaintiff had lost twenty percent of his lung function. (Tr. v. III at 218). Dr. Kern further confirmed that the plaintiff suffered from asbestosis (Tr. v. III at 185, 187, 189) and that during his examination of Dunn he heard rales. (Tr. v. III at 198-99).

Dunn himself testified that he experienced both shortness of breath and fatigue. (Tr. v. IV at 144-46). He has also lost weight and has been unable to work as an insulator or participate in athletic activities. (Tr. v. IV at 155). Plaintiff testified that he fears that he will develop cancer (Tr. v. IV at 155-57) and feels depressed. (Tr. v. IV at 158).

Defendant's doctors all found pleural plaques but did not diagnose the plaintiff as suffering from asbestosis. Defendant, furthermore, put on evidence that plaintiff was presently engaged in a wide variety of activities as demonstrated by medical reports made when plaintiff underwent knee surgery in Texas.

It was well within the jury's province to decide to credit the testimony of plaintiff's doctors while discounting that of defendant's. As previously stated, plaintiff's experts clearly testified that Dunn suffered from asbestosis, that his lung capacity had severely decreased, that there was more than a fifty percent chance of Dunn dying from this disease and that he had a reasonable fear of cancer. It was the jury's function to weigh the testimony and credibility of both plaintiff's and defendant's doctors and this court will not substitute its judgment for that of the jury's when the verdict is not against the weight of the evidence. *See Roebuck,* 852 F.2d at 736; *Lind v. Schenley Industries, Inc.*, 278 F.2d 79,90 (3d Cir.) (en banc), *cert. denied,* 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60 (1960). Thus defendant's motion for a new trial because the verdict was against the weight of the evidence is denied.

Defendant also argues that it is entitled to a new trial because the compensatory damages awarded to Dunn were excessive. This court agrees that the $1.3 million which the jury awarded to plaintiff is an immense sum and far exceeds damage awards which have been returned in cases involving much greater injury from asbestos inhalation than this plaintiff exhibits. *See* Defendant's App. to Supp. Brief. Indeed plaintiffs in other cases, who suffer from lung cancer and mesothelioma, an incurable and fast progressing cancer, have often received verdicts of less than a million dollars. Furthermore, Dunn did not make a claim for either lost wages or past or future medical expenses but rather based his claim solely upon past and future pain and suffering and fear of cancer. Indeed, it is undisputed that plaintiff presently works full time and that he continues to lead a somewhat active life.

The $1.3 million which the jury awarded in this case is both shocking and not reasonably related to the evidence produced regarding Dunn's injuries. Therefore, it is the duty of this court to require a new trial or remittitur. *Linn v. United Plan Guard Workers*, 383 U.S. 53, 66, 86 S.Ct. 657, 664, 15 L.Ed.2d 582 (1966); *Walters v. Mintec/Int'l*, 758 F.2d 73, 82 (3d Cir.1985). Remittitur is appropriate when the verdict is not the result of passion or prejudice. *Brown v. McBro Planning and Dev. Co.*, 660 F.Supp. 1333, 1337-1338 (D.V.I.1987). In this case, the verdict was not the result of passion or prejudice, but does constitute an excessive verdict.[1]

This court finds that the sum of $500,000 provides adequate compensation to Dunn and is much more consistent with the amount of damages which have been returned in similar cases of mild asbestosis. *See* Def. App. to Supp. Brief. Therefore, a new trial

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1. *See infra* for a further discussion of remittitur.

will be ordered on the grounds that the verdict was excessive, unless plaintiff accepts the sum of $500,000 for compensatory damages.

BIFURCATION

Defendant argues that a new trial should be granted because this court did not reverse bifurcate the trial and allow the issues of injury and medical causation to be tried before the issues of product identification, corporate knowledge and punitive damages. A number of months before trial, Judge Broitman, acting Chief Judge of this Court, had ordered that the trial proceed in the above described manner.

Subsequently and shortly before trial, Judge Broitman ruled that the decision as to bifurcation should be left to the trial judge. This court ruled that the case would not be reverse bifurcated. Defendant claims that it was prejudiced by the court's refusal to reverse bifurcate because it proceeded with the belief that its medical experts (under reverse bifurcation) would testify on November 14, 1990. Defendant's experts, however, were unavailable at this time and defendant made the decision to take these experts' *de bene esse* depositions. Defendant claims that if it had known that the trial was not going to be reverse bifurcated, it could have presented live testimony. Thus defendant states that it was denied the opportunity to present live testimony. Defendant furthermore claims that the court's refusal to reverse bifurcate the trial prejudiced the jury by allowing it to hear "evidence early in the case upon which plaintiff later sought punitive damages."

"[T]he fact that bifurcation did not occur is not necessarily prejudicial to the [defendant]. The decision to bifurcate is within the discretion of the trial judge." *Johnson*, 899 F.2d at 1289. *See*

also Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 283 (2d Cir.), *cert. dism'd*, _____ U.S. _____, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990) (same); *In re Master Key Antitrust Litigation*, 528 F.2d 5, 14 (2d Cir. 1975) (same).

In this case, defendant can show no prejudice as a result of this court's decision not to reverse bifurcate the trial. The fact that this court rescinded Judge Broitman's order should have come as no surprise to the defendant because the Judge's order specifically stated that plaintiff's motion to reconsider bifurcation "is denied without prejudice, and plaintiff is free to raise the issue with Judge Motley prior to trial." Thus Judge Broitman's order specifically contemplated that his decision would be reconsidered shortly before trial. Consequently, defendant can claim no surprise and no prejudice.

In addition, defendant's argument that if it had known that reverse bifurcation would not occur it could have produced live testimony, is specious. Dr. Feingold, one of defendant's medical experts, specifically testified that he was unavailable at trial because his wife expected to give birth in the near future. Even with modern technology's ability to predict when the birth of a child will occur, the difference of one week would not have assured this witness' availability. (Dep. of Dr. Feingold at 13). Dr. Hinshaw, another expert witness testified that he lived in California (quite a distance from the Virgin Islands), was 82 years old and had a very busy schedule. Obviously, his testimony being taken a week later would not have changed any of these facts.

Finally, it was not this court's order which deprived the defendant of live testimony, rather it was the order which called for reverse bifurcation which necessitated defendant's use of taped depositions in the first place. Thus Owens-Corning was left in

exactly the same position that it would have been in if reverse bifurcation had occurred.

This court can find no prejudice in its refusal to reverse bifurcate.

IMPROPER CONDUCT BY PLAINTIFF'S COUNSEL

Defendant claims that plaintiff's counsel behaved improperly on a number of occasions. It claims that such behavior was prejudicial and resulted in reversible error. First, defendant claims that during closing argument, plaintiff's counsel specifically requested the sum of $50,000 a year for compensation for pain and suffering and fear of cancer for the statistically relevant 19.6 remaining years of plaintiff's life.[2]

In *Waldorf v. Shuta,* 896 F.2d 723 (3d Cir.1990), the Third Circuit held that under federal law, counsel may not request a specific dollar figure for pain and suffering in closing argument. *Id.* at 744. Dunn argues, however, that this court's jurisdiction was invoked, in paragraph one of his complaint, pursuant to 4 V.I.C. § 32. Thus, he argues that this case is entirely local in nature as 4 V.I.C. § 32 is not a federal jurisdictional statute. Plaintiff argues

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2. Mr. Holt argued in his closing:

> And, if you give him just $50,000 a year for the rest of his life, that's $1 million right there if you don't give him anything for the past. And that's why in the beginning of this case, I told you, I was going to ask for a verdict in excess of $1 million. And for compensatory injuries of Mr. Dunn, I believe 1.3 million dollars is enough money to compensate him for what he's been through, but more important for what he's going to go through. (Tr. v. VIII at 44-45).

that such a reference to a specific dollar figure is permissible because Virgin Islands law specifically provides that:

> Notwithstanding any provision of law, in any cause of action based on tort, contract law, or otherwise to recover damages for injury or death to the person for harm to the plaintiff resulting from the defendant's wrongful conduct, no complaint or cross complaint shall specify the amount of damages but shall contain a prayer for general relief and shall state that the damages are within the jurisdictional limits of the court to which the pleading is addressed. *Nothing in the section shall be construed as preventing a party from asking for a specific amount of damages at the trial.*

5 V.I.C. § 5. (emphasis supplied). The Third Circuit, however, has stated that this statute is irrelevant to the issue of whether references to *ad damnum* clauses are allowed under Virgin Islands law. *Gumbs v. Pueblo Int'l, Inc.*, 823 F.2d 768, 771 n.1 (3d Cir. 1987).[3]

Judge Robert Carter (S.D.N.Y.), sitting by designation in St. Thomas, Virgin Islands, recently addressed the issue of whether *Waldorf* applies in the Virgin Islands. In *Warner v. Lawrence,* 754 F.Supp. 449 (D.V.I.1991), the court stated that:

> Given the unique status of this court, it is not altogether clear whether *Waldorf* governs this case, or whether the

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3. In *Gumbs*, decided before *Waldorf*, the Third Circuit stated that references to *ad damnum* clauses had in the past been allowed in the Virgin Islands as a matter of custom but refused to rule on the permissibility of such statements in either the Third Circuit or the Virgin Islands. *Gumbs*, 823 F.2d at 771.

propriety of the closing argument depends on local law. *See Murray v. Fairbanks Morse* 610 F.2d 149, 152 n. 4 (3d Cir. 1979) (in dictum treating this matter as an issue of local law). Although the Federal Rules of Civil Procedure apply to this court in the same manner as they apply to the ordinary United States District Courts, 48 U.S.C. § 1614(b), the position of this court may be different from that of an ordinary United States District Court with respect to the Appellate Courts' supervisory powers. *See Barnard v. Thorstenn,* 489 U.S. 546, 551-552, 109 S.Ct. 1294, 1298-99, 103 L. Ed.2d 559 (1989).

The Court of Appeals for the Third Circuit, however, would almost certainly reach the same result under local law as under federal law. The reasoning of *Waldorf, supra,* 896; F.2d at 744, that reference to the amount of damages in the closing argument is likely to encourage the jury to "irrationally inflate[] the damage award," does not depend on the federal-law context but is equally applicable to Virgin Islands law. The Court of Appeals has long expressed reservations about the propriety of such closing arguments in Virgin Islands cases, although it has repeatedly declined to decide the issue. *See Gumbs, supra,* 823 F.2d at 771. The Virgin Islands statute prohibiting *ad damnum* clauses in complaints, 5 V.I.C. § 5, does not affect the law concerning references to damages at trial. *Gumbs, supra,* 823 F.2d at 771 n. 1. Accordingly, whether the issue is covered by federal or local law, the plaintiff's closing argument was improper.

However, I do not recall the defendants' having made an objection to the plaintiff's closing argument at trial, and the court reporter has not been able to find any such objection

> in his stenographic notes. If the defendants did not object to the closing argument at trial, then they have waived their right to object now. *See Murray v. Fairbanks Morse,* supra, 610 F.2d at 152. Improper reference to the amount of damages in closing argument does not constitute 'plain error' reviewable in the absence of an objection.

Id. at 458.

This case is very similar to the *Warner* case. Owens-Corning claims that plaintiff's counsel, by mentioning a specific dollar figure, committed reversible error. Defense counsel, however, failed to object to counsel's statements at the time that they were made, after plaintiff's counsel concluded his closing or at any time before the jury deliberated. Defendant's failure to object constitutes a waiver and precludes it from seeking a new trial. *Murray v. Fairbanks Morse,* 610 F.2d 149, 152 (3d Cir. 1979). Defendant's request for a new trial on this issue is denied because defendant failed to object to plaintiff's closing remarks during trial.[4]

Defendant's next contention is that plaintiff's attorney's conduct, which consisted of acting as if he was going to saw a piece of insulation and actually produce dust in the courtroom, highly prejudiced the jury. One juror attempted to cover her nose with a jacket to prevent inhaling the dust. (Tr. v. IV at 120-23). The insulation used in the courtroom, however, was asbestos-free Kaylo, was not actually cut with a saw, and thus posed no harm to

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4. Defendant also objects to plaintiff's counsel mentioning a specific dollar figure during closing argument of the punitive damage phase of the trial. Once again, however, defendant failed to object and has likewise waived this argument.

the jurors, which this court clearly explained. (Tr. v. IV at 124). The court also prohibited plaintiff from any further demonstration. Thus this court cannot find that this demonstration was so highly prejudicial that it warrants a new trial.

EXCLUSION OF DEFENDANT'S WITNESSES

Defendant next claims that this court improperly excluded Mr. Gillivan from testifying. Gillivan had been a juror when this case was tried for the first time before Judge O'Brien.[5] Defendant claims that the witness would have testified that plaintiff's physical condition and behavior on the street differed from that in the court-room during the trial. Defendant claims that plaintiffs counsel had previously interviewed the witness and that the defendant's counsel notified plaintiff of his intention to call the witness. Defendant argues that such testimony went to the plaintiff's credibility and, therefore, that this court's preclusion of such testimony resulted in prejudice to the defendant and constitutes reversible error.

The court excluded the testimony of Gillivan because it was untimely and defendant had not given plaintiff sufficient notice. Gillivan was not listed in response to plaintiff's discovery requests, nor was he listed in defendant's pre-trial submissions, nor on the witness list submitted during jury selection. Plaintiff's counsel strongly opposed the suggestion that they had ever interviewed Gillivan and swore an affidavit to this effect. Defendant cannot complain of prejudice in this court's failure to allow Gillivan to

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5. As previously explained, the case was first tried in May, 1989 in front of Judge O'Brien. At the close of plaintiff's case, Judge O'Brien became sick and died a few months later. A mistrial was declared.

testify when defendant failed to inform opposing counsel or this court that such testimony would be proffered.

In addition, defendant contends that this court's failure to allow defendant to put on an economist during the punitive damage phase of the trial constituted similar error. Likewise, the first time that defendant offered such testimony was moments before the jury was to be charged, although defendant knew for years that plaintiff was requesting punitive damages. (Tr. v. VIII at 3-4).

Defendant argues that *Dabney v. Montgomery Ward & Co.*, 692 F.2d 49 (8th Cir. 1982), *cert. denied*, 461 U.S. 957, 103 S.Ct. 2429, 77 L.Ed.2d 1316 (1983) supports the argument that exclusion of these witnesses constitutes reversible error. However, in *Dabney*, the court stated:

> 'a district court may exclude from evidence at trial any matter which was not properly disclosed in compliance with the Court's pretrial order, and such ruling will be reversed on appeal only for abuse of discretion.' *Iowa-Mo. Enterprises, Inc. v. Avren*, 639 F.2d 443, 447 (8 Cir. 1981) [sic]; *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877,897-98 (8 Cir. 1978) [sic].

Id. at 51. In *Dabney* the court found that the witness had been only recently discovered, although there had been diligent investigation, and that under those circumstances, the witness should have been allowed to testify. No such situation exists in this case. Defendant does not claim that these were newly discovered witnesses and offers no excuse as to why these witnesses were not previously disclosed. Under a situation such as this, it was purely within the discretion of this court "to exclude testimony of a witness who had not been identified." *Semper v. Santos*, 845 F.2d 1233, 1238 (3d

Cir.1988) (St. Croix court excluded witness when identified one day after start of jury selection). *See also Tunis Bros. Co. v. Ford Motor Co.*, 124 F.R.D. 95, 97-98 (E.D.Pa. 1989) (failure to list witness justified excluding witness).

EVIDENTIARY QUESTIONS

Defendant argues that this court erred in a number of rulings regarding the acceptance or rejection of specific evidence. This court will address the most meritorious of defendant's arguments.

First, defendant claims that it was error to allow the plaintiff to present evidence regarding lung cancer, mesothelioma and heart trouble. Defendant argues that plaintiff does not presently have such conditions and is unlikely to develop them in the future. In addition, defendant argues that the error was compounded by allowing plaintiff's medical expert to testify that a nodule discovered by a defense expert was potentially malignant. Defendant claims that the admission of such testimony was prejudicial because it allowed the jury to speculate about plaintiff's potential development of various diseases which he is unlikely to contract. It also claims that such evidence allowed plaintiff to go beyond issues framed in the pleadings and various agreements of counsel.[6]

As plaintiff points out, however, plaintiff was not trying to recover for an enhanced risk of cancer, but rather for the emotional distress resulting from a fear of developing cancer. *See* Restatement (Second) of Torts § 905(e)(6) ("A seriously wounds B,

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6. Defendant claims that plaintiff agreed prior to trial that the nodule was benign and would not be an issue at trial.

who fears that the wound will cause death .... B is entitled to compensatory damages for the fear of death."). Such evidence must be allowed if the jury is to determine whether the plaintiff possesses a reasonable fear of developing cancer. In addition, there was ample evidence to show that exposure to asbestos can increase one's risk of developing numerous diseases. Defendant claims that it presented evidence that as a non-smoker plaintiff was not at a higher risk of developing cancer. However, it was up to the jury to weigh the credibility of such evidence.

Defendant relies upon *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589 (5th Cir. 1986), to support its argument. In *Adams* the Fifth Circuit found that evidence regarding increased risk of cancer or reasonable fear of developing cancer could not be admitted because plaintiff failed to show an asbestos-related injury or any substantial likelihood of future injury. Defendant's reliance upon *Adams* is misplaced. First, the Fifth Circuit was explicitly interpreting Louisiana law in reaching its conclusion. Thus the ruling in that case has little applicability to the law of St. Croix or the Third Circuit. Second, in *Adams* it appeared that the plaintiff did not suffer *any* asbestos related injury. *Id.* at 590-91. In the case at hand, there was testimony, which the jury could choose to believe, that plaintiff suffered from pleural plaques and asbestosis which resulted from his exposure to asbestos.

Furthermore, at trial there was undisputed testimony that the nodule was benign. Plaintiff never insinuated that the nodule was malignant and this court clearly stated in its jury instructions that the jury must bear in mind the difference between compensating someone for a reasonable fear of cancer and compensation for cancer itself. (Tr. v. VIII at 136).

Defendant next claims that this court erred in allowing plaintiff's expert, Dr. Egilman, to offer his opinion as to the state of medical knowledge regarding the dangers of asbestos in the first half of this century. Defendant further states that: "During this process the Court ruled that it was permissible for plaintiff to ask leading questions of its expert in direct examination. Further, the Court erroneously permitted plaintiff's counsel to consult with Dr. Egilman at breaks in his direct examination." Defendant also claims that the court did not allow it to fully cross-examine the witness.

Dr. Egilman is a specialist in occupational medicine and as such was qualified to testify about the history of asbestos research and its effect on humans. The Advisory Notes to Fed.R.Evid. 702 state that "[t]he rule accordingly recognizes that an expert on the stand may give it dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts." Clearly relevant to the liability of defendant in this case, and properly admitted, was evidence concerning when the scientific and business community first became aware of the dangers of asbestos. This defendant's motion as to this argument is denied.

Under Fed.R.Evid. 611, this court, in its discretion in governing the mode of interrogating witnesses, allowed plaintiff's counsel to address a number of leading questions to the witness as was necessary to develop the witness' medical testimony. No error can be assigned to this limited mode of interrogation. *See Alpha Display Paging, Inc. v. Motorola Communications & Electronics, Inc.*, 867 F.2d 1168, 1171 (8th Cir. 1989) ("district court must be given great discretion in governing mode of interrogating witnesses"); *Government of Virgin Islands v. Dowling*, 633 F.2d 660, 667 (3d Cir.), *cert. denied*, 449 U.S. 960, 101 S.Ct. 374, 66

L.Ed.2d 228 (1980) (no abuse of discretion when court allowed Virgin Islands prosecutor to use leading questions on direct examination). *See also* 3 Weinstein's Evidence 611-79 ("Rule 611(c) acknowledges that leading questions may be necessary to develop the testimony."). Defendant further argues that this court allowed Dr. Egilman to elaborate upon a number of answers during cross-examination. This was allowed only to clarify complicated medical testimony and was perfectly proper. *See United States v. Young,* 745 F.2d 733,761 (2d Cir.1984), *cert. denied,* 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985) (trial court has broad discretion in deciding whether or not to allow narrative testimony."). Furthermore, after reading the record, this court can find no error regarding the testimony of Dr. Egilman which would require that a new trial be granted.

Next, defendant complains that it was unduly restricted in the cross-examination of the plaintiff. First, defendant argues that it should have been allowed to question the plaintiff regarding numerous aviation safety violations for which plaintiff was cited. Defendant claims that these violations were relevant to the issue of whether adequate warnings on Kaylo, if there had been such warnings, would have been effective. Second, defendant claims that it was error for this court to prohibit defendant from demonstrating that plaintiff continues to work. The court also prohibited defendant from introducing federal income tax returns and the fact that defendant has owned numerous houses in an attempt to demonstrate that plaintiff is not financially burdened and that he no longer has significant contacts with the Virgin Islands.

This court excluded the above testimony as irrelevant to the case. First, the plaintiff made no claim for lost wages or livelihood but rather only for pain and suffering. Thus the financial aspects of the plaintiff's present employment were entirely irrelevant. This court, however, specifically allowed the defendant to inquire as to whether the plaintiff was presently working and the nature of his present occupation. (Tr. v. IV at 110). Furthermore, the court allowed defendant to go into any medical history which would go to the plaintiff's current condition or health (Tr. v. IV at 220).

This court disallowed questioning as to plaintiff's aviation violations because any connection between his disregarding of aviation rules and disregarding of Kaylo warnings (assuming their existence) was entirely speculative. Under Fed.R.Evid. 401 such testimony would not have had any tendency to make the existence of any fact of consequence more or less probable. In this case, the acts are simply too dissimilar and to speculative to be relevant. In addition, Fed.R.Evid. 404 specifically states that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show conformity therewith." This appears to be precisely the reason defendant wished to elicit evidence of plaintiff's aviation violations and thus was properly ruled inadmissible. (Tr. v. VII at 82-88).

Defendant next argues that a document entitled the "Hemeon Report" should not have been introduced as evidence. The Hemeon Report is an unpublished 1947 technical report presented to the Asbestos Textile Institute which questioned the notion that the five million particle level for asbestos was safe. Owens-Corning argues that because it was not a member of this group, it could not have been on notice of the recommendations contained in the report. The Hemeon Report, however, may be introduced against companies who were not members to demon-

strate what a company could have known if it had conducted similar studies or if it had contacted others in the industry. *See George v. Celotex Corp.*, 914 F.2d 26, 29 (2d Cir. 1990) (Hemeon Report relevant not to show what company knew but what company should have known).

Once again, after reading the record, this court does not find any reversible error regarding the cross-examination of plaintiff. Furthermore, the court does not find any merit to the numerous other objections raised by the defendant.

JURY INSTRUCTIONS

Defendant argues that this court failed to conduct any meaningful discussion regarding jury instructions after the court informed the parties which of their objections had been accepted or rejected. The court finds this argument to lack any merit. First, there was continuous discussion throughout trial regarding how this court would charge the jury. More importantly, the court specifically told the parties which instructions had been accepted or rejected and allowed the parties, at that time, to make comments, objections and arguments to the court. (Tr. v. VII at 99-120). "'[A]trial judge is not required to write out his charge in advance and submit it to counsel for their editing and exceptions,' *Puggioni v. Luckenbach Steamship Co.*, 286 F.2d 340, 344 (2d Cir. 1961), and nothing in Federal Rule of Civil Procedure 51 dictates otherwise." *Emerick v. U.S. Suzuki Motor Corp.*, 750 F.2d 19, 23 (3d Cir. 1984).

Defendant also argues that a number of specific instructions were prejudicial. First, defendant states that this court practically directed a verdict for the plaintiff by giving the following instruction: "Defendant, Owens-Corning, is liable for any damage you find that plaintiff is entitled to by reason of any defective product sold or manufactured by the defendant." (Tr. v. VIII at 120). Defendant contends that "[a]t a minimum this sentence should have included the words: provided it is a substantial contributing factor in bringing about injury to plaintiff." However, on the very next page of the record, the court instructed that: "Second, the plaintiff must prove that the defective condition of this defendant's product proximately caused injury to the plaintiff." (Tr. v. VIII at 121). Shortly afterwards, the court again instructed thoroughly on proximate cause and substantial contributing factor. (Tr. v. VIII at 127-30). This court fails to see the manner in which defendant, in any way, was prejudiced. In addition, this court cannot find any objection from the defendant. Indeed, when this court asked the parties to put any exceptions to the charge on the record, defendant stated: "Your honor, generally we think the -- there were a couple of places where we disagreed, but the court cured those in later paragraphs." (Tr. v. VIII at 151). Defendant's counsel then went on to object to three instructions given by this court, none of which concern defendant's present objection.

Next, defendant claims that it was prejudiced by the court's decision to require the jurors to calculate a dollar figure for each manufacturer listed on the verdict form who contributed to plaintiff's injury. Defendant claims that the jury should have only been asked to assign a percentage of negligence. It is defendant's theory that the jury failed to make any apportionment because they did not want to make the mathematical calculation. Defendant,

however, did not object to this calculation being on the form[7] and indeed included a similar calculation on the proposed verdict form it submitted to the court. Furthermore, 5 V.I.C. § 1451, entitled "Comparative Damages," specifically states that "[w]here recovery is allowed against more than one defendant, the trier of fact shall apportion, in dollars and cents, the amount awarded against each defendant."

Defendant also argues that it was prejudiced by not having the bankruptcy defendants included on the verdict form along with the list of settling defendants. Defendant cites the case of *Rocco v. Johns-Manville Corp.*, 754 F.2d 110 (3d Cir. 1985), for the proposition that these defendants should have been included. *Rocco* simply does not answer the question of whether a bankrupt, non-settling, non-participating defendant should be listed on the verdict form. Furthermore, it was defendant who originally argued to this court that only the settling defendants should be included on the verdict form. The following colloquy occurred:

> Court: How many [defendants] did you list in your proposed request to charge, in your proposed questions to the jury? Mr. Fitzpatrick: Your Honor, only those that are allowed to us by case law and statute, those that have settled. That's all.... We have not listed anyone who has not

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7. Rather it was Mr. Holt, plaintiff's counsel, who stated "you want the jury to do all this math, or would you like them to do percentage [sic] and let the court do the math in all these." Only then did defense counsel state: "In fairness, I don't know that they're required to do it for anyone other than us after they return a verdict against us in terms of dollars [sic] damages if they come back with the verdict. But, I think in apportioning a fault, the percentage is sufficient." (Tr. v. VIII at 143-144).

> settled because of bankruptcy — because by statute we can't list those.

(Tr. v. V at 160). The transcript shows that Mr. Fitzpatrick went on to state that he wished that particular jury instructions be given regarding the bankrupt defendants, but that defendant's revised verdict form contained only the names of the settling defendants. (Tr. v. V at 160-66, 186-87). Indeed, it was defendant's verdict form that this court used in preparing the list of defendants for the court's verdict form. When the attorneys were given the verdict form to review, defendant did not object to the omission of the bankrupt defendants. After the court read the instructions, the parties again brought any objections to the verdict form to the court's attention and again defendant did not object. (Tr. v. VIII at 146-53).

Even if defendant had objected to the omission of these names, this court cannot find any prejudice that defendant suffered nor does defendant articulate any.

Defendant furthermore argues that the court's instructions regarding when a warning was necessary on a product misstated the law and conveyed the impression that defendant should have warned when the circumstances presented "even some potential danger." The court instructed that: "A manufacturer is under a duty to warn persons (whose exposure to the dangers inherent in its product are reasonably foreseeable) of the danger which in the exercise of reasonable care it either knew or should have known to exist at the time of exposure and to make that warning reasonably adequate under the circumstances." (Tr. v. VIII at 124-25). Shortly afterwards, the court stated:

> In this connection, a manufacturer must take reasonable steps to keep abreast of knowledge as to the dangers of its products. Such knowledge as there is to be gained through research, scientific literature and other reasonable available methods of inquiry.
>
> A manufacturer is held to that level of knowledge which a reasonably prudent person in a particular industry would have learned given the state of medical and scientific knowledge and technology at or before the time of exposure, not in the light of subsequent medical or scientific developments.
>
> Based on what a manufacturer actually knew or should have known, a manufacturer must give such warnings as a reasonably prudent person in the position of the manufacturer would have considered necessary to avoid injury.
>
> The greater the potential hazard of the product of which the defendant was aware or reasonably should have been aware, the more extensive must be the manufacturer's efforts to avoid injury by making that hazard known to the reasonably foreseeable user.

(Tr. v. VIII at 126). The charge was an accurate representation of existing law and the court can find no merit in defendant's contentions.

Although defendant has raised a number of other objections to the jury instructions, this court finds that defendant was not prejudiced in any manner and that the instructions were proper.

THE CONSTITUTIONALITY OF PUNITIVE DAMAGES

Defendant claims that the imposition of punitive damages in multiple toxic tort suits is unconstitutional under the Due Process Clause of the Fifth Amendment, the Excess Find Clause of the Eighth Amendment and other constitutional provisions. Defendant raised this argument a number of times during trial. This court, following the lead of a number of other courts throughout this country, rejects defendant's arguments. The Supreme Court has previously ruled that the Excess Fines Clause of the Eighth Amendment does not apply to punitive damages. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). That case also suggests that the Cruel and Unusual Punishment Clause of the Eighth Amendment is not implicated in an award of punitive damages. *Id.* 109 S.Ct. at 2912. *See also Racich v. Celotex Corp.*, 887 F.2d 393, 397 (2d Cir. 1989) (same).

Owens-Corning's principal argument seems to be that the multiple imposition of punitive damages,without limit, for the same conduct is violative of the notion of fundamental fairness embodied in due process. The Second Circuit has stated that "the multiple imposition of punitive damages for the same course of conduct *may* raise serious constitutional concerns in the absence of any limiting principle." *Racich*, 887 F.2d at 398 (emphasis added). The Second Circuit has even more recently held that a defendant, in order to sustain an argument regarding the imposition of multiple damages, must present evidence of previous punitive damage awards, whether these cases are presently on appeal or whether the cases settled, and how much in damages as *actually* been paid to plaintiffs. Without such a record a court cannot answer the due process argument. *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277,

280-82 (2d Cir.), *cert. dism'd,* _____ U.S. _____, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990). *See also LaDuca v. Celotex Corp.,* No. 89-7684 (2d Cir. April 23, 1990) (available on Lexis); *Johnson v. Celotex Corp.,* 899 F.2d at 1287-88.[8] This court specifically asked defendant's counsel what punitive damage awards had been assessed against Owens-Corning prior to this trial. Defense attorney stated that he thought punitive damages were assessed three times in fifteen years but that he could not be sure. When this court inquired as to the amount of these punitive damage awards counsel stated, "I was just recently hit with punitive damages in the state of Virginia for $100,000 ... then there was another verdict I think it was for $35,000. And one may have been for $1 million. I'm not sure." (Tr. v. V at 86-87). Never did counsel state whether these awards were actually paid out or whether the cases are on appeal. It was only in defendant's supplemental papers[9] regarding the motion for a JNOV that defendant submitted an affidavit regarding past punitive damages that have been assessed against Owens-Corning. this court can fathom no reason why defendant did not include this information int he memorandum submitted to this court during trial or mention this when the court specifically questioned counsel. Defense counsel are experienced attorneys in the field of asbestos

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8. At least one court has found that the imposition of multiple punitive damages is not a violation of due process. *See Guarino v. Armstrong World Indus., Inc.,* No. 88-1087 Civ. (S.D.Fla. Oct. 13, 1989) (available on Lexis) (the concept of fundamental fairness embodied in substantive due process does not require that defendant be protected from the imposition of multiple punitive damages).

9. These supplemental papers were submitted eight months after trial and defendant's first memorandum regarding the JNOV. This delay was the result of the court and the parties waiting for the trial transcripts to become available. However, the issue of punitive damages which Owens-Corning had previously paid was in no way related to the availability of the trial transcripts.

litigation and were clearly aware that plaintiff was asking for punitive damages.[10]

Even if such a record had been made during trial, when defense counsel were given every opportunity to do so, no court in the country has squarely declared that the imposition of multiple punitive damages constitutes a Fourteenth Amendment violation. Rather this court agrees with the statement of the Second Circuit that such a holding "would be a far-reaching holding, indeed, particularly in the context of mass tort litigation that suggests the need for a uniform, national rule on the issue. Under all the circumstances, we believe that such a step, if it is to be taken (and we express no view as to that), is best left for Congress or for higher judicial authority." *Johnson,* 899 F.2d at 1288 (*quoting Racich v. Celotex Corp.*, 887 F.2d 393, 399 (2d Cir. 1989)). *See also Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 817 (6th Cir. 1982) (argument regarding multiple punitive damages more appropriately addressed to state or federal legislature); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1569-70 (6th Cir. 1985), *cert. denied,* 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986) (same); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 406 (5th Cir.) (en banc), *cert. denied,* 478 U.S. 1022, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986) (same).

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10. Likewise, defendant could have introduced evidence at trial regarding past punitive awards, but chose not to do so. *See Acosta v. Honda Motor Co.*, 717 F.2d 828, 839 n. 17 (3d Cir. 1983) ("a jury might decide that a defendant's financial position, as a result of other awards of punitive damages for the same conduct, is so precarious that a sizable award of punitive damages would be inappropriate.").

Defendant also argues that the punitive damage instruction to the jury did not include any standard for determining whether an award was appropriate or the manner in which an award was to be calculated. Recently, the Supreme Court stated that "we cannot say that the common-law method of assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional." *Pacific Mut. Life Ins. Co. v. Haslip,* _____ U.S. _____, _____, 111 S.Ct. 1032, 1043, 113 L.Ed.2d 1 (1991).

This court instructed the jury that punitive damages should be returned only if the jury found that plaintiff "clearly and convincingly established that the action of defendant which caused injury to the plaintiff was wanton and reckless." (Tr. v. VIII at 209). The charge further instructed that the amount the jury chose to award was entirely up to them and that they were not required to award punitive damages. (Tr. v. VIII at 209-10). The court also made clear that the purpose of punitive damages was to act as a deterrent. (Tr. v. VIII at 210-11). These standards have been expressly adopted by the Third Circuit as the correct ones. *Berroyer v. Hertz,* 672 F.2d 334, 340 (3d Cir. 1982); *Acosta v. Honda Motor Co.,* 717 F.2d 828, 833 (3d Cir. 1983). *See also Justin v. Guardian Ins. Co.,* 670 F. Supp. 614, 617 (D.V.I. 1987) (to get to a Virgin Islands jury on the issue of punitive damages, the plaintiff must show *by clear and convincing evidence* "that the acts complained of were outrageous, done with evil motive or reckless indifference to his rights.").

Indeed the Supreme Court in *Haslip* upheld Alabama's punitive damage law even though its standard of proof only required that the jury be "reasonably satisfied from the evidence." *Haslip*, 111 S.Ct. at 1046 n. 11. By requiring clear and convincing evidence, Virgin Island law provides even greater procedural protection for the defendant than the Supreme Court requires. This

court can only conclude that instructions such as those given in the Virgin Islands serve to "reasonably accommodate[] [defendant's] interest in rational decision making and [the state's] interest in meaningful individualized assessment of appropriate deterrence and retribution." *Haslip,* 111 S.Ct at 1044.

In *Haslip* the Supreme Court cited the fact that Alabama provided post-verdict review of punitive damages as adding to defendant's due process safeguards. The Supreme Court, however, did not insinuate that such procedures were mandated by the constitution or that post-verdict review pursuant to the Federal Rules of Civil Procedure was constitutionally inadequate. Indeed at least one circuit, applying *Haslip,* found that post-trial procedures which were not as detailed or as specific as that found in Alabama satisfied all constitutional concerns. *See Eichenseer v. Reserve Life Ins. Co.,* 934 F.2d 1377, 1384-86 (5th Cir. 1991) (upholding Mississippi law which provides that courts may set aside punitive damages only when an award is the result of passion, bias and prejudice). As demonstrated *infra* the Federal Rules of Civil Procedure have provided, in this case, a "definite and meaningful constraint on the discretion" of this jury. *See Haslip,* 111 S.Ct. at 1045.

Defendant finally argues that the court's instructions were incorrect because § 908 of the Restatement (Second) of Torts lists the nature and extent of the harm to the plaintiff as a factor which the jury may take into account when fashioning an award of punitive damages. Defendant, however, failed to object to this specific instruction when the court asked the parties for any objections. (Tr. v. VIII at 211-212). Defendant merely stated that the charge was "unconstitutionally uninformed and that it does not provide standards for the jury upon which to base an award of punitive damages." (Tr. at *id.*). This objection was simply a

reiteration of what defendant had argued both orally and in a written motion regarding the constitutionality of punitive damages and was in no way related to the Restatement. This generalized objection is insufficient under Fed. R.Civ. P. 51 which states that an objection must be stated distinctly as to its matter and grounds. Indeed, after making this general objection, Owens-Corning's counsel continued by stating "with regard to the charge, itself, Your Honor, we would on Page 34, object additionally...." (Tr. v. VIII at 212). Defendant then went on to list specific instructions. The purpose of Rule 51 is to avoid a retrial when the losing party fails to make a timely objection. *See* 9 Wright and Miller, *Federal Practice and Procedure* § 2551. A curative instruction on this matter could have alleviated any alleged defect. Defendant has waived any objection regarding any deficiency as related to the Restatement.[11]

EVIDENCE OF WILLFULNESS OR WANTONNESS

A review of the evidence shows that an award of punitive damages was supported by the evidence. Plaintiff produced evidence at trial from which the jury could have reasonably concluded that the defendant acted in a wanton or reckless manner. Plaintiff, through the testimony of experts and numerous documents, demonstrated that Owens-Corning knew since at least the early 1940s that the asbestos contained in Kaylo was a dangerous substance and produced disease in human beings. *See, e.g.*, Tr. v. III at 245; Tr. v. V at 19-25; Pl.Exh. 9, 57.

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11. Defendant did not even bring up these arguments regarding the Restatement until it filed the supplemental brief.

In the 1940s, Owens-Corning was having difficulty with asbestos workers who were demanding higher wages when using fiberglass material than when using asbestos-containing material. These workers believed that fiberglass could produce health hazards. As a result of the union's demands, Edward Ames, Owens's public relations officer and assistant to the president, circulated an internal memorandum on January 7, 1942, which proposed that asbestos workers be informed of the extent of the hazards posed by asbestos-containing insulation. Ames wrote the following in his memorandum:

> Gather as a weapon-in-reserve an impressive file of photostats of medical literature on asbestosis. Available are two bibliographies covering medical literature to 1938, citing references to scores of publications in which the lung and skin hazards of asbestos are discussed.

(Pl. Exh. 9).

Ames testified that Owens-Corning knew by this time that exposure to asbestos fibers could cause asbestosis and that Mr. Boeschenstein, President of Owens-Corning, "knew everything." (Tr. v. III at 245-46).

Mr. Ames, in 1943, wrote a further memorandum criticizing Owens-Corning's proposal of adding asbestos to fiberglass. The memorandum states:

> In formulating our policy on admixtures with asbestos, we should keep on alert because otherwise *we will run the risk of smearing fiberglass with the hazards of exposure to asbestos.*

Fabrication of asbestos (in both textile and pre-textile form) is a dusty process, and exposure to asbestos fly involves the danger of asbestosis, a pathological lung condition....

P. Exh. 15 (emphasis in original).

In the 1950s, Dr. Schepers, head of the Saranac laboratory in New York, warned Owens-Corning that Kaylo contained material which would be dangerous to human beings. (Tr. v. V at 24). During this time period, Dr. Schepers wrote a letter to Dr. Burch, an Owens-Corning employee, stating that "asbestos is fairly well incriminated as a carcinogen" and that asbestos caused fibrosis. (Pl. Exh. 35 and 38).

Although defendant produced a witness from Owens-Corning, Jerry Helser, who testified that warnings were placed on Kaylo products in 1966 (Tr. v. VI at 14-16), Dunn and Bully both testified that they never saw any such warnings. (Tr. v. IV at 136; Tr. v. III at 150-51). Plaintiff produced a great deal of additional material which demonstrated that both Owens-Corning and the medical community knew of the dangers of asbestos. Thus, "[t]he jury was free to conclude ... that appellants knew of the dangers of asbestos and did not adequately warn users of asbestos, thereby acting in a wanton or reckless manner." *Johnson,* 899 F.2d at 1288.

PLAINTIFF'S ATTORNEY'S CONDUCT DURING CLOSING ARGUMENT REGARDING PUNITIVE DAMAGES

Defendant claims that plaintiff's counsel's remarks during closing argument regarding punitive damages were highly inflammatory and prejudicial and thus warrant a new trial. Defen-

dant claims that plaintiff argued to the jury that counsel for Owens-Corning lied to them during trial and that defendant's attorneys had engaged in an effort to cover up damaging information.[12] Owens-Corning also argues that plaintiff's counsel's statement that Owens-Corning refused to establish a trust fund to compensate deserving victims was highly prejudicial. Although, arguments such as these may not be proper in a closing argument regarding liability, they are not improper in a summation regarding punitive damages. "In attempting to convince a jury that a defendant's conduct was outrageous and should be punished, an advocate must go beyond the kind of argument necessary to establish ordinary negligence." *Herman v. Hess Oil Virgin Islands Corp.*, 379 F. Supp. 1268, 1276 (D.V.I. 1974), *aff'd*, 524 F.2d 767 (3d Cir. 1975).

Defendant cites the case of *Draper v. Airco, Inc.*, 580 F.2d 91, 96-97 (3d Cir. 1978) for the proposition that this court must order a new trial due to counsel's remarks. In *Draper*, however,

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12. Plaintiff's counsel stated the following in closing argument on the issue of punitive damages:

> It's incredible for me to stand here to tell you that. But for 50 years, 1940, this company knew from the documents that you've seen and have presented to you, that asbestos-containing products caused permanent lung damage, later, that it caused cancer and mesothelioma. And it did nothing about it except suppress that information.
>
> Unfortunately, ladies and gentlemen, you have heard a story here in this courtroom the last two weeks of corporate manipulation, of corporate suppression, and a word that I hate to use, of corporate lies.
>
> But, what's so bad about that is just not things that occur over the last 40 or 50 years. But, it's even occurred in this courtroom. It's occurred in this courtroom.
>
> (Tr. v. VIII at 188).

Defendant interprets these remarks as an attack on counsel.

counsel during closing argument *on liability* prejudiced the jury by repeatedly referring to material which was not in evidence, the wealth of the defendant, the poverty of plaintiff's widow, his personal opinion as to the guilt of the defendant, and by actually pointing at defendant's lawyers and accusing them of being part of the conspiracy. *Id.* at 95-96. In this case, plaintiff's counsel did not come close to the undignified, discourteous and prejudicial conduct in which the attorney in *Draper* engaged. Indeed, it is unclear whether the comments to which defendant points were directed at defendant's counsel or at statements from various corporate agents and defense witnesses.

The only possible prejudice which this court can find in plaintiff's summation regarding punitive damages is what could conceivably be considered an appeal to local prejudice. Plaintiff stated the following: "You've got to have the courage to tell this big multi-national company, that it's not going to come into the Virgin Islands and hurt people and lie about it." (Tr. v. VIII at 195). After plaintiff's closing, defendant moved for a mistrial stating that plaintiff's remarks regarding defendant's "lying" were highly prejudicial. Defendant never objected to the closing on the grounds that plaintiff appealed to local prejudice. *See DeRance, Inc. v. Paine Webber, Inc.*, 872 F.2d 1312, 1326-27 (7th Cir. 1989) (a motion for a mistrial due to alleged prejudice arising from closing argument must specifically state grounds for motion; global objection to entire argument as prejudicial does not contain requisite specificity; therefore, similar closing argument regarding local prejudice held permissible as variation on argument that "punitive damages must serve as an example to a particular community"). In the absence of an objection, this court does not find these scattered remarks to be so prejudicial that a new trial is warranted. *Hess*, 524 F.2d at 772 ("While an appeal for local prejudice against foreign defendants is never permissible even where punitive damages

are sought, we do not believe that the isolated remarks ... which were arguably an appeal to local sentiment in this case were so prejudicial ... as to constitute reversible error in the absence of any objection or request for cautionary instruction."). Furthermore, this court does not believe that anything plaintiff said, in terms of Owens-Corning being a foreign corporation which shipped products into the Virgin Islands, was not obvious from testimony and evidence presented during trial.

Although plaintiff's counsel's arguments may have come close to the borderline, they did not transgress it.[13] This court has read the transcript of the argument and finds that counsel's arguments were fair comment on the evidence and do not warrant a new trial.

AMOUNT OF THE AWARD

As previously stated, a jury award should be reduced only if it is "so grossly excessive as to shock the judicial conscience." *Black v. Stephens,* 662 F.2d 181, 192 (3d Cir. 1981), *cert. denied,* 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982) (quoting *Murray v. Fairbanks Morse,* 610 F.2d 149, 152-53 (3d Cir. 1979)); *Edynak v. Atlantic Shipping, Inc.,* 562 F.2d 215, 225 (3d Cir. 1977), *cert. denied,* 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed. 2d 781 (1978). *See also Rocco v. Johns-Manville Corp.,* 754 F.2d 110, 114 (3d Cir. 1985). In such a case, however, "where there is no clear judicial error or 'pernicious influence' ... but where the verdict is so large as to shock the conscience of the court" the court

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13. Defendant claims that a number of plaintiff's counsel's statements were prejudicial. As previously stated the defendant failed to specifically object to any of these statements and as such has waived the argument. As stated in the text of this opinion, even if defendant had objected, this court finds defendant's arguments to be without merit.

can order plaintiff to "remit the portion of the verdict in excess of the maximum amount supportable by the evidence or, if the remittitur were refused, to submit to a new trial." *Kazan v. Wolinski*, 721 F.2d 911, 914 (3d Cir. 1983).

In *Brown v. McBro Planing & Dev. Co.*, 660 F.Supp. 1333 (D.V.I. 1987), the District Court of the Virgin Islands stated:

> The Court can grant a remittitur and propose a reduction in the jury award when in its discretion it decides that a verdict is so grossly excessive that it is not rationally related to any evidence adduced a [sic] trial. *See David v. Pueblo Supermarket of St. Thomas, Inc.*, 740 F.2d 230, 239 (3rd Cir. 1984); *Edynak v. Atlantic Shipping, Inc.*, 562 F.2d 215, 226 (3d Cir. 1977) (a jury verdict cannot stand when it is "so grossly excessive as to shock the judicial conscience"), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); *Murray v. Beloit Power Systems, Inc.*, 79 F.R.D. 590, 592 (D.V.I. 1978) (remittitur is proper when damages assessed by a jury are so unreasonable as to offend the conscience of the court); *Lettsome v. Elmer*, 1977 St. Croix Supp. 154 (D.V.I. 1977) (remittitur is proper when the court has a "definite and firm conviction that a mistake has been made" and where the amount of the jury award "offends the conscience of the court"). When the court finds that the jury award was the result of passion and prejudice, the proper remedy is a new trial. But where the verdict is not patently the product of bias, passion, or prejudice, but is simply excessive, the court can grant a remittitur.

Id. at 1337.

The jury was instructed that any award for punitive damages should sting the defendant and act as a deterrent to such conduct in the future. (Tr. v. VIII at 211). Furthermore, "[i]t is well settled that the wealth of the defendant is a factor which may properly be considered by the trier of fact in assessing punitive damages." *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975). In this case, plaintiff's economist, Lawrence Roberts, testified as to the worth of Owens-Corning. He testified that Owens-Corning, for the last three years, had a net average earning after all expenses and income taxes were paid of $196,333,333. (Tr. v. VIII at 176). He read from the Owens-Corning 1988 annual stockholders' report in which the Board of Directors stated the following: "the additional cost which may arise out of pending personal injury and property damage, asbestos claims and additional similar asbestosis claim problems in the future will not have a materially adverse effect on the company's financial position." (Tr. v. VIII at 178). Mr. Roberts further testified, however, that the company was $435 million in debt and had over 73,000 cases pending in court. (Tr. v. VIII at 179-80). The jury was entitled to use this information to determine what size award would sting the defendant.

This court realizes that Owens-Corning is a large and profitable corporation and that the jury could have found that Owens-Corning knew of the serious risk which asbestos dust poses much earlier than it suggests. Yet $25 million is a tremendous award and over nineteen times as large as the jury's overly generous compensatory award.[14] Indeed, the Supreme Court cautioned that a punitive damage award which was four times the amount of

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14. It is fifty times larger than the $500,000 to which this court reduced the award.

the compensatory award may be close to the line of what is constitutionally permissible. *Haslip,* 111 S.Ct. at 1046.

This court further recognizes that it cannot simply substitute its own judgment as to the appropriate amount of punitive damages without infringing upon plaintiff's constitutional right to a jury trial. It appears obvious that the jury wished to sting Owens-Corning and punish it for past actions. Thus this court's suggestion of a reasonable figure will not be an unwarranted infringement upon plaintiff's right to have the jury determine the award, as long as the figure that this court suggests accomplishes the same goal which the jury had in mind. *Herman v. Hess Oil Virgin Islands Corporation,* 379 F. Supp. 1268, 1277 (D.V.I. 1974), *aff'd,* 524 F.2d 767 (3d Cir. 1975). The court concludes that a reasonable figure is $2 million. This constitutes a substantial sum and will accomplish deterrence while at the same time avoiding excessive punishment and the diversion of substantial sums of money from other deserving victims. *See id.* at 1277. Furthermore, the court recognizes that the jury's award of $25 million in punitive damages was one of the largest awards of its kind. In reducing this award, in order to effectuate the jury's intent, it is proper that this award be towards the high end of what juries have awarded in other cases. *See* App. to Def. Supp. Memorandum. Finally, the sum is rationally related to the $500,000 in compensatory damages (*cf. Perez v. Weigers,* Civ. 155/1989, 1990 WL 181171 (D.V.I. Oct. 12, 1990) (available on Lexis) (award for punitive damages twice the amount of compensatory damages satisfied requirement that punitive damages must be rationally related to actual injury)), without having exceeded the multiple of four constitutionally permitted by the Supreme Court in *Haslip.*

Owens-Corning's motion for a new trial on punitive damages is denied on the condition that plaintiff file a remittitur.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-3837

WILLIAM DUNN
HESS OIL VIRGIN ISLANDS CORP.
v.
HOVIC; AMERADA HESS CORP.; KEENE CORPORATION
v.
THE LITWIN CORPORATION;
LITWIN PANAMERICAN CORP.;
BORINQUEN INSULATION CO.

Owens-Corning Fiberglas Corporation,
Appellant

On Appeal from the
District Court for the Virgin Islands (St. Croix)
(D.C. Civil No. 87-00238)

Present: Sloviter, **Chief Judge**, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Roth, Lewis, and Weis, **Circuit Judges**

JUDGMENT

This cause came to be heard on the record from the District Court of the Virgin Islands and was argued by counsel April 22, 1992 and reargued before the Court and the original panel in banc on February 2, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 2, 1991, be, and the same is hereby vacated with respect to the punitive damages imposed in the amount of $1,000,000, costs taxed against appellant. It is further ordered and adjudged that the said judgment of the District Court is affirmed insofar as Owens-Corning Fiberglas Corporation's motion for Judgment NOV was denied the compensatory damage award remitted to $500,000, all of the above in accordance with the opinion of this Court.

ATTEST:
/s/ [illegible]
Chief Deputy Clerk

Dated: July 27, 1993

Certified as a true copy and issued in lieu
of a formal mandate on September 1, 1993.

Teste: /s/ P. Douglas Sr.

Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-3837

WILLIAM DUNN
HESS OIL VIRGIN ISLANDS CORP.
v.
HOVIC; AMERADA HESS CORP.; KEENE CORPORATION
v.
THE LITWIN CORPORATION;
LITWIN PANAMERICAN CORP.;
BORINQUEN INSULATION CO.

Owens-Corning Fiberglas Corporation,
Appellant

Present: Sloviter, **Chief Judge**, Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Roth, and Weis,*
Circuit Judges

ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that the Clerk of this Court vacate the panel's opinion and judgment filed September 18, 1992, and list the above case for rehearing in banc at the convenience of the court.

By the Court,

/s/ Dolores K. Sloviter
Chief Judge

Dated: October 8, 1992

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*. as to panel rehearing only.

CONSTITUTIONAL PROVISION INVOLVED

This petition involves the Due Process clause of the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment to a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

PUNITIVE-DAMAGES AWARDS AGAINST OWENS-CORNING

CASE NAME	PUNITIVE-DAMAGES AWARD
A. Awards Before *Dunn*:	
Adams, et al. v. Owens-Corning, Circuit Court of Monongalia County, West Virginia, No. 86-C-763 (Nov. 13, 1990), *see* JA at 1944. (Judgment paid after denial of petition for certiorari, 113 S. Ct. 3035 (1993))	$ 630,000
Barnes, et al. v. Owens-Corning, Circuit Court of Monongalia County, West Virginia, No. 86-C-763 (Nov. 13, 1990), *see* JA at 1944. (Judgment paid after denial of petition for certiorari, 113 S. Ct. 3035 (1993)).	$3,750,000
Barry v. Owens-Corning, Circuit Court, Cook County, Illinois, No. 83L11989 (1987), *see* JA at 1945. (Settled)	$ 25,000
Brennan v. Owens-Corning, et al., Guam Superior Court, No. CV986-86 (1991), *see* JA at 1948. (Pending)	$4,125,000

Davis v. Owens-Corning, Circuit Court of Monongalia County, West Virginia, No. 86-C-763 (1989), *see* JA at 1944. (Settled)	$ 280,000
Gizzi v. Owens-Corning, United States District Court, Southern District of Ohio, No. C-1-24-0961 (1987), *see* JA at 1944. (Settled)	$2,000,000
Gravina v. Owens-Corning, United States District Court, Southern District of Florida, No. 90-1815-CIV RYSKAMP (1991), *see* JA at 1945. (Settled)	$ 10,000
Reneau, et al. v. Owens-Corning, Madison County Circuit Court, Illinois, No. 87-L-870 (Nov. 1, 1990), *see* JA at 1944. (Pending)	$5,000,000
Schoenian, et al. v. Owens-Corning, Circuit Court of Ohio County, West Virginia, No. 87-C-775-B (1989), *see* JA at 1944. (Settled)	$3,900,000
Skadan & Walters v. Owens-Corning, Supreme Court, County of Erie, New York, No. H-93455 (Dec. 20, 1990), *see* JA at 1944. (Settled)	$ 130,000

Watson v. Owens-Corning, Circuit Court, City of Newport News, Virginia, No. 12292-RC (Oct. 5, 1990), *see* JA at 1944. (Settled)	$ 100,000

B. Awards After *Dunn*:

Blalock v. Raybestos-Manhattan, et al., Superior Court, San Francisco County, California, No. 938511 (1993). (Pending)	$1,000,000
Ciliento v. Owens-Corning Fiberglas Corp., et al., Circuit Court of Fourth Judicial Circuit, Duval County, Florida, No. 92-18335-CA (1993), *see Florida Jury Awards $2.6M in Two Mesothelioma Cases*, Asbestos Litig. Rptr. 27920 (Andrews, July 16, 1993). (Pending)	$ 100
In re: Consolidated Asbestos Cases, Circuit Court of Fourth Judicial Circuit, Duval County, Florida, No. 92-16334-CA (1993), *see Verdicts Against OCF in Two FL Meso Cases Total $10 Million*, Asbestos Litig. Rptr. 27648 (Andrews, June 4, 1993). (Pending)	$5,000,000

Freeman v. A C& S, Inc., et al., District Court, Harris County, Texas, 61st Judicial Dist., No. 85-39398 (1993), *see Texas Jury Awards $20,943,000 in Seven Cases*, Asbestos Litig. Rptr. 27926 (Andrews, July 16, 1993). (Pending)	$ 300,000
Jadlowski & Jadlowski v. A.C. & S., Inc., et al., Superior Court of New Jersey, Law Division - Middlesex County, No. L-0703-91 (1993), *see NJ Jury Hits OCF with $15M Punitive Damage Award*, Asbestos Litig. Rptr. 27553 (Andrews, May 21, 1993). (Pending)	$15,000,000 (remitted to $2,500,000)
Koster v. Owens-Corning, McCracken County Circuit Court, Division II, Kentucky, No. 93-CI-00302 (1993). (Pending)	$500,000
Norris v. Armstrong World Indus., et al., Circuit Court of 13th Judicial Circuit, Hillsborough County, Florida, No. 92-8125 (1993), *see FL Jury Assesses OCF with $2 Million in Living Meso Case*, Asbestos Litig. Rptr. 28235 (Andrews, Sept. 3, 1993). (Pending)	$750,000

Pickering, et al. v. Owens-Corning, Madison County Circuit Court, Illinois, Nos. 90-L-1546, et al. (1992), *see IL Judge Enters Default Against OCF; Jury Awards $10.79M in 4 Cases*, Asbestos Litig. Rptr. 25062 (Andrews, Apr. 17, 1992). (Pending)	$7,500,000
Rekdahl v. Owens-Corning, et al., Superior Court, Los Angeles County, California, No. BC 029051 (1992), *see California Jury Awards $12.45M in Living Mesothelioma Case*, Asbestos Litig. Rptr. 24881 (Andrews, Mar. 20, 1992). (Pending)	$4,000,000
Ripa v. Keene Corp., et al., Superior Court of New Jersey, Law Division - Camden County, No. L-92337-87 (1993), *see OCF Assessed with $5.5M in Punitives by Camden Jury*, Asbestos Litig. Rptr. 27555 (Andrews, May 21, 1993). (Pending)	$5,500,000
Schiavo v. GAF Corp., Superior Court of New Jersey - Law Division, Camden County, No. L-07636-88 (1993), *see NJ Jury Awards $600,000 in Meso Death Case*, Asbestos Litig. Rptr. 27718 (Andrews, June 18, 1993). (Pending)	$100,000

Seuss v. Owens-Corning Fiberglas Corp., et al., Circuit Court of Fourth Judicial Circuit, Duval County, Florida, No. 92-18325-CA (1993), *see Florida Jury Awards $2.6M in Two Mesothelioma Cases*, Asbestos Litig. Rptr. 27920 (Andrews, July 16, 1993). (Pending)	$ 100
Smith v. Owens-Corning, McLean County Circuit Court, Illinois, No. 87-L-293 (1993), *see OCF Defaulted on Liability Issues, Assessed with Damages by IL Jury*, Asbestos Litig. Rptr. 26893 (Andrews, Feb. 5, 1993). (Settled)	$ 50,000
Spaur v. Owens-Corning, District Court for Polk County, Iowa, No. CLA-028 (1992), *see Iowa Jury Awards $3.4M in Mesothelioma Death Case Against OCF*, Asbestos Litig. Rptr. 25174 (Andrews, May 1, 1992). (Pending)	$1,500,000
Wasiak v. Fibreboard Corp., et al., District Court, Travis County, Texas, 147th Judicial District, No. 92-02238 (1993), *see Verdicts: More than $6.3 Million Returned in Texas Trial*, Mealey's Litig. Reports - Asbestos 16 (Sept. 3, 1993). (Pending)	$4,350,000

Wheeler & Jackson v. Owens-Corning, Circuit Court, Harris County, Texas, No. 85-44370, et al. (1992), *see TX Jury Awards $2.98M to Six Refinery Workers*, Asbestos Litig. Rptr. 24887 (Andrews, Mar. 20, 1992). (Pending)	$ 60,000
Williams v. A.C.&S., Inc., District Court, Harris County, Texas, 189th Judicial Dist. (1993), *see TX Jury Awards $13M in 30 Cases; PC and OCF Assessed Punitives*, Asbestos Litig. Rptr. 27466 (Andrews, May 7, 1993). (Pending)	$2,000,000

(2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 93-658

In The

Supreme Court of the United States

October Term, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

WILLIAM DUNN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

JOEL H. HOLT
2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-8709

PAUL S. MINOR
MINOR & GUISE
310 Main Street
P.O. Drawer 1388
Biloxi, MS 39533

Counsel for Respondent William Dunn

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Michael Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 28 (Papers of the Roscoe Pound Found. 1991)* 20

In its Petition for Certiorari, the Petitioner seeks relief on grounds not properly before this Court. Specifically, the Petitioner asks this Court to strike punitive damages in all asbestos claims against it because multiple awards violate the due process clause of the Fourteenth Amendment. By asking this Court to grant such an extraordinary remedy, the Petitioner conveniently ignores the fact that the trial court, a panel of the Third Circuit and a majority of the *en banc* Third Circuit found that the Petitioner failed to properly preserve this issue. As discussed herein, certiorari should be denied because:

1. The Petitioner failed to properly preserve this issue by creating a factual record of the issue it now seeks this Court to review.

2. The Court of Appeals decision is not in conflict with any decisions of this Court or any other Court of Appeals.

3. The *en banc* Court of Appeals decision regarding the legal issue raised by the Petitioner is correct.

It should also be noted that the Petition contains essentially the same argument raised in its request to this Court to stay the mandate of the Circuit, which request was denied by Justice Souter.

STATEMENT OF THE CASE

The evidence presented at trial is critical to an understanding of why this Petition should be denied. Since the Petitioner failed to inform this Court of the record made

during the trial, a brief summary of that evidence must first be discussed.

The evidence at trial regarding the conduct of the Petitioner, Owens Corning Fiberglas (hereinafter referred to as "OCF"), was found by both the trial judge and the Court of Appeals to be more than sufficient from which a jury could reasonably conclude that OCF acted "with reckless indifference" in distributing asbestos products without adequate warnings. The evidence supporting the award of punitive damages in this case is summarized in the Third Circuit Opinion and the District Court Opinion denying post-trial relief. (App. to Pet. at 3a-7a and 126a-122a).[1]

The trial evidence unequivocally demonstrated that OCF's top management, including its president and chief operating officer as well as its corporate counsel knew about the danger of asbestos to insulators such as the Respondent ("Dunn") as early as 1941. At that time OCF did not sell asbestos products but sold a competing product containing fiberglass. When threatened by the insulation union that its workers wanted more money to install fiberglass insulation due to its itchy nature, OCF's public relations officer sent a memorandum dated January 7, 1942, to OCF's president and executive vice president stating as follows:

---

[1] All citations will be to the Appendix attached to OCF's Petition. References to the trial record are contained in the decisions which are in the Appendix but will not be repeated herein. Counsel is willing to provide these actual references upon request by this Court.

> [g]ather as a weapon-in-reserve an impressive file of photostats of medical literature on asbestosis. Available are two bibliographies covering medical literature to 1938, citing references to scores of publications in which the lung and skin hazards of asbestos are discussed. This file would cover five or six hundred pages. . . . (App. at 4a)

OCF continued to receive information regarding the health hazards of asbestos over the next two years and avoided using asbestos in its insulation products because of this danger. As noted in another internal OCF memorandum circulated in 1943:

> [i]n formulating our policy on admixtures with asbestos, we should keep on the alert because otherwise *we will run the risk of smearing fiberglas [sic] with the hazards of exposure to asbestos.*
>
> Fabrication of asbestos (in both textile and pretextile form) is a dusty process, and exposure to asbestos fly involves the danger of asbestosis, a pathological lung condition . . . minimized by the use of hoods and . . . respirators. (App. at 5a) (emphasis in original).

Because fiberglass failed to obtain the desired market share in competing with asbestos products, OCF began to distribute asbestos insulation in 1953 despite its prior knowledge of the danger it posed to insulators. From the outset Dr. Garret Schepers, head of the Saranac Laboratory in New York, warned OCF that this product was hazardous to human beings, but OCF ignored these warnings even though they were consistent with OCF's prior knowledge of the adverse health effects of asbestos. As noted by the Third Circuit in its *en banc* opinion:

> Dr. Schepers also wrote two letters to Dr. M.D. Burch, director of personnel and industrial relations at OCF at the time, advising him that "asbestos is fairly well incriminated as a carcinogen," and that asbestos dust caused fibrosis. *Despite these warnings*, OCF published brochures which repeatedly represented Kaylo as "*nontoxic*." In addition, OCF touted Kaylo's "ease of application," and its "pleasant handling characteristics." These brochures contained no warning of potential hazards. (App. at 5a-6a) (Reference to trial record omitted.) (Emphasis added.)

Thus, although OCF's management was willing to use the dangers of asbestos to its commercial advantage when it did not sell this type of product, it had no hesitancy in concealing this known danger when it was commercially advantageous for OCF to do so.

During the 1960s, OCF continued to distribute the product without warnings even though its competition did so and even though its knowledge of the dangers of asbestos to insulators continued to expand. Indeed, OCF knew that it was exposing thousands of workers to this danger but it refused to even place warnings on its asbestos products despite the admonition from corporate personnel that lawsuits are inevitable and "the amounts requested [by claimants] are usually sizeable." (App. at 6a).

These internal memos confirm that OCF was aware that it was subjecting insulators such as Dunn to injury.[2]

---

[2] Contrary to OCF's suggestion in its Petition that Dunn was not injured, the trial judge noted that Dunn was covered in

OCF also knew that it was exposing itself to potentially thousands of lawsuits. Notwithstanding this knowledge, the Third Circuit noted that there was sufficient evidence before the jury for it to conclude that OCF never placed any warnings on its products prior to 1972 when asbestos insulation was no longer sold. (App. at 6a-7a).

As noted by the Third Circuit in its *en banc* opinion:

> In light of this evidence, we agree with the recent conclusion of the Virginia Supreme Court that
>
> > [t]he jury may have concluded . . . that Owens-Corning knew that inhalation of dust from its Kaylo product could cause lung disease in humans, that it actively concealed this danger, and it did not warn insulators of this hazard. . . .
>
> *Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630, 642 (Va. 1992). The jury could reasonably have found that OCF acted with "reckless indifference to the rights of others" in this case. . . . (App. at 7a).

Indeed, the evidence of OCF's punitive conduct was so strong that the *en banc* dissent did not even suggest that the finding of punitive conduct was inappropriate. Moreover, OCF understandably has not even challenged this finding in its Petition.

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asbestos dust at work which his doctors concluded had caused Dunn to develop a serious progressive and incurable lung disease that would probably be the cause of his death. (App. at 89a-95a).

While the jurors heard evidence regarding OCF's conduct, OCF did not produce *any evidence* at trial of any prior awards of punitive damages against it. Thus, under the circumstances, it is clear that the jurors could only conclude that this would be the first and perhaps only award of punitive damages to be entered against OCF.

The only evidence of other punitive damage awards were submitted *after* the jury's verdict in post-trial motions submitted to the District Court Judge. This post-trial submission consisted of a self-serving affidavit listing other *alleged* verdicts of punitive damages against OCF which representation was not subject to the investigatory procedures of discovery or any challenge through cross-examination. As noted by the Third Circuit, even these submissions failed to demonstrate that OCF has ever paid any award of punitive damages. (App. at 33a).

OCF continued to add new representations to this affidavit at various stages throughout the post-trial and appellate process. Indeed, OCF's argument that it made only a limited profit on its total sales of asbestos products was only raised in the Third Circuit after the first panel opinion and just prior to the *en banc* argument. As noted by the Third Circuit, it was unwilling to act on evidence not introduced at the trial level and not subject to challenge by the Plaintiff. (App. at 36a). In rejecting this late submission as untimely, the Third Circuit noted that it was OCF's burden to make this evidentiary showing in the trial record, which it failed to do. (App. at 36a).

Not only did OCF fail to introduce evidence of any prior punitive damage awards against it to the jury, but the jurors also heard testimony which would directly

refute OCF's suggestion in its Petition that the threat of multiple awards may affect its financial condition since the jurors were told that OCF's financial statements affirmatively stated that the company's management did not believe that any of the pending or future asbestos litigation would have "a material adverse effect on the company's financial position." (App. at 127a).

As noted by the Third Circuit, OCF's current financial statements sent to shareholders and the SEC continue to refute its claim of financial ruin as OCF management continues to affirmatively state to the SEC and its shareholders as follows:

> [a]lthough any opinion is necessarily judgmental and must be based on information now known to the Company, in the opinion of management, based on the Company's experience with these claims to date, the Company's assessment of the number, nature and severity of the pending claims and the trends in the filing of such claims, and the Company's analysis of its available insurance coverage and existing reserves, and of the Company's future business and financial prospects, the additional uninsured costs which may arise out of pending personal injury and property damage asbestos claims and additional similar asbestos claims filed in the future *will not have a materially adverse effect on the Company's financial position*. (App. at 35a) (emphasis in original).

The Third Circuit found this statement so compelling in rejecting OCF's due process argument that it quoted the statement in the opinion. (App. at 35a). The Third Circuit also took note of OCF's $1.26 billion in unexhausted

insurance coverage as well as its reserves in excess of $100 million for future uninsured costs. (App. at 34a).

Thus, virtually *every* representation contained in OCF's Statement of the Case regarding specific facts related to the asbestos litigation was not contained in the trial record. In fact, OCF has even submitted additional information to this Court which was not fully contained in the Appellate record. OCF's action is apparently in response to the Third Circuit's criticism for not previously presenting this information while raising legal arguments unsupported by any established facts.[3]

With the foregoing comments in mind, it is now appropriate to turn to the comments raised in OCF's Petition.

I. The Circuit Courts all Agree that the Failure to Make a Proper Factual Record Bars Even Consideration of the Due Process Claim Now Being Raised By OCF.

At the outset, it must be pointed out that the relief the Petitioner seeks from this Court is quite extraordinary. The essence of the Petitioner's argument is that this Court should strike punitive damages in all asbestos cases pending against this Defendant because of the potential magnitude of the asbestos claims against it, the financial cost resulting from this litigation when compared to the alleged profits made from the product and the existence of other alleged punitive damage awards

[3] If information beyond the trial record could be considered, the fact that OCF's stock has increased from $15.00 a share at the time of the verdict in this case to $48.00 a share today would be relevant in addressing OCF's claim that multiple awards of punitive damages seriously affects its financial stability.

against the Petitioner. In short, the Petitioner complains that the threat of multiple awards of punitive damages violates its right to substantive due process.

As noted by the majority of the Third Circuit in rendering its *en banc* decision:

> We do not preclude a particular defendant from invoking the due process clause as a basis for relieving it of punitive damages in a specific case. However, the evidence produced by OCF falls far short of demonstrating any due process violation here.
>
> . . . .
>
> Assuming arguendo that we would accept this analysis, the factual record made by the defendant must, as a prerequisite to relief on due process grounds, include evidence demonstrating the amount of punitive damages it has actually paid in the past. In this case, OCF has simply failed to make such a showing.
>
> . . . .
>
> In sum, OCF simply has not made a "showing that the total [amount of punitive damages assessed so far] is even close to whatever limit due process might impose on the total punitive damages that may be assessed . . . for . . . misconduct with respect to asbestos warnings."
>
> . . . .
>
> Nor has OCF shown on this record that it will be unable to satisfy current and future asbestos claims. Although the costs associated with asbestos litigation may have wiped out any profits OCF made from the sale of its Kaylo product, OCF failed to submit any evidence at trial concerning the profitability of its Kaylo product, or concerning the profits of the other

> manufacturers. (App. at pp. 32a-36a). (Citations omitted.)

Thus, it is clear that the factual basis necessary to even raise the issue that the Petitioner intends to argue was not properly made in the trial Court.

The result reached by the Third Circuit is in complete accord with the decisions of all other Circuits that have addressed this issue, which includes the Second, Fifth and Sixth Circuits. As noted by the Second Circuit in *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2nd Cir. 1990), *cert. denied*, 497 U.S. 1057 (1990):

> In the pending case, the record is insufficient to support a due process ruling on either of the theories we have outlined. As to the single award approach, appellant made no showing that the jury in either of the two prior asbestos cases where punitive damages were awarded against Pittsburgh Corning had a complete record of the full extent of appellant's wrongful conduct in failing to warn all users of the dangers of its asbestos products, nor that either jury was instructed to return a punitive award appropriate as punishment for the totality of such misconduct. As to the aggregate award approach, appellant made no showing that the total of the two awards, $375,000, is even close to whatever limit due process might impose on the total punitive damages that may be assessed against Pittsburgh Corning for its misconduct with respect to asbestos warnings. *Id.* at 281.

See also, Racich v. Celotex Corp., 887 F.2d 393, 398 (2nd Cir. 1989) (holding that the due process argument requires a sufficient record at trial, demonstrating circumstances of prior punitive awards). All other circuits have reached

this same conclusion using similar language in rejecting this due process argument in asbestos related litigation. *See Solly v. Manville Asbestos Disease Fund*, 966 F.2d 1454 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 411 (1992); *King v. Armstrong World Indus., Inc.*, 906 F.2d 1022 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991); *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 402-07 (5th Cir.), *cert. denied*, 478 U.S. 1022 (1986); *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985); *Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1041-42 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

Indeed, rather than argue that the threat of multiple awards satisfied the deterrence purpose of punitive damages, OCF instead argued at trial that it did nothing wrong. The defendant in *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394 (5th Cir. 1986) took a similar approach by arguing that it did nothing wrong which the Fifth Circuit recognized as a legitimate trial tactic but one which prevented a subsequent change in position at the appellate level that the threat of such multiple awards satisfied the punishment and deterrence objectives of punitive damages.

In summary, OCF failed to raise this issue in a timely fashion. It failed to raise the issue prior to trial so that appropriate discovery could be done in order for the plaintiff to meet this challenge. OCF also failed to present this evidence during the trial so that it could be effectively challenged through cross-examination. It was only after the jury verdict that OCF sought to make this record. Under the circumstances, both the District Court and the Third Circuit properly refused to permit OCF to "judicially" add to the trial record.

Thus, the Third Circuit correctly concluded that OCF failed to make a factual record to even warrant consideration of a due process argument. As such, OCF's Petition should be denied by this Court as well.

II. There is Adequate Due Process Protection for Defendants Who Face Multiple Awards of Punitive Damages.

This Court has recently held in two separate decisions regarding due process challenges to punitive damage awards that a "general concern of reasonableness . . . properly enters into the constitutional calculus" in determining whether a particular award violates the due process clause. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993). In this regard, there is already ample judicial protection against a violation of a defendant's due process when faced with exposure to multiple awards of punitive damages.

At the outset, it should be noted that in order to even raise this issue, it must be conceded that a party's conduct warrants an award of punitive damages and that this outrageous conduct has injured numerous people. In the matter *sub judice*, OCF does not dispute the sufficiency of the evidence regarding the finding that its conduct was done with reckless indifference and that this conduct injured Dunn. Moreover, OCF had to reasonably expect that this same conduct would injure thousands of workers and that their claims would be "sizeable."

Notwithstanding these presumptions, OCF argues that it should not be subject to multiple awards of punitive damages. The Illinois Appellate Court in *Froud v. Celotex Corporation*, 437 N.E. 2d 910 (Ill. App. 3rd 1982) *rev'd on other grounds*, 456 N.E. 2d 131 (Ill. 1983) put this issue into proper perspective when it stated as follows:

> . . . [W]e do not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they may have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages. *Id.* at 913.

See also, Jackson v. Johns-Manville Sales Corp., 781 F.2d 394, 407 (5th Cir. 1986) (Holding that it is inconsistent to shield a defendant who commits an act that injures a "myriad of innocent persons" from punitive damages simply because of the "sheer magnitude of the wrong.")

Clearly multiple awards of punitive damages are not *per se* "unreasonable" when raised in the foregoing context so that the threat of multiple awards is not a *per se* violation of one's due process rights. Thus, the only remaining question is how to protect a defendant's right to due process when its conduct warrants consideration of such multiple awards of punitive damages.

The Virgin Islands has enacted a statute which adopts the *Restatement of Law* as established by the American Law Institute as the rule of law where no other

Virgin Islands statute is on point. 1 V.I.C. §4.[4] Thus, section 908 of the *Restatement, Second, of Torts* governs this issue by statute in the Virgin Islands. *Comment* "e" of the *Restatement* provides in part as follows:

> Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight being given to the prior awards. . . .

Pursuant to this section, the defendant must put into evidence other awards of punitive damages so that the trier of fact can decide what weight, if any, to give to both past and future awards. Had OCF done so in this case, the jury would have been so instructed to consider this evidence as required by the *Restatement*.

As noted in *Haslip*, a critical factor in guaranteeing a defendant's right to due process is an appropriate jury instruction. The instruction given by the trial court in this case was initially challenged by OCF, but both the District Court and the Third Circuit expressly found that the

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[4] Section 4 of Title 1 of the Virgin Islands Code provides in part as follows:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

instruction fully complied with *Haslip* (App. at 14a-20a).[5] Likewise, the other procedural safeguards required by *Haslip* were carefully analyzed by the District Court as well as *en banc* panel of the Third Circuit which concluded that these safeguards had been properly followed in this case. In fact, the application of these factors resulted in a substantial reduction of the jury verdict, which is indicative of due process protection given to OCF within this judicial proceeding.[6]

Interestingly, OCF has not argued in its Petition that the mandates of *Haslip* and *TXO* have not been fully adhered to by the lower court proceedings in this case. Having conceded that these safeguards have been met, OCF still argues that the imposition of multiple punitive damage awards violates its right to due process. The difficulty in accepting this argument is addressed by the numerous courts that have considered this issue. Some of these problems include:

1. Is the first award of punitive damages to be the only permitted award under a due process argument? If so, a defendant such as OCF could selectively stipulate to trying this issue in a friendly forum in a minor case and

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[5] The trial took place prior to *Haslip* but the post-trial and appellate proceedings fully analyzed the instruction and other procedural safeguards enunciated in *Haslip* which was rendered after the jury's verdict.

[6] The District Court was particularly protective of OCF's rights during the trial, as the Court bifurcated the punitive aspect of the case so as not to prejudice OCF during the liability phase of the trial. The Court also required the evidence of punitive damages to be proven by the higher standard of "clear and convincing" proof.

possibly escape with only a nominal award.[7] Further, if there is an award of $25,000 in this first trial, would it violate OCF's due process rights to face another award elsewhere?

2. Is the first plaintiff who recovers such an award the only plaintiff entitled to receive such an award? If so, have the due process rights of other victims been adequately protected as well?

3. Since obviously more than one award of punitive damages may appropriately be entered against OCF, at what number is the line drawn?

4. What if the evidence of punitive conduct against OCF elicited during a trial in 1989 does not include evidence subsequently obtained in discovery which further incriminates OCF? Is there a violation of OCF's due process rights if this subsequently discovered evidence is not considered for the first time by another jury in 1990?[8]

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[7] Indeed, the only final award against OCF presented in the post-trial submission was a punitive damage award of $80,000 where OCF stipulated to the amount in question. *See Owens-Illinois v. Armstrong*, 591 A.2d 544 (Md. Ct. Spec. App. 1991).

[8] For example, the trial in this case began in May of 1989. The trial judge became ill and subsequently died so that a mistrial was declared. Prior to the second trial in 1990, the 1950 letters of Dr. Schepers surfaced for the first time which told OCF that Kaylo was carcinogenic and a health hazard for insulators. Notwithstanding this fact, OCF's brochures described its product as "non-toxic" and safe. This evidence was a critical part of the Third Circuit decision affirming this award. (App. at 5a-6a). Should OCF's right to due process prevent consideration of this new evidence if there had been a prior award against it?

5. Is OCF's conduct over a 20-year period one course of conduct or numerous sets of misconduct?

6. Is there a percentage of OCF's gross sales, net profit or total assets that can be used to measure the total amount of punitive damages that will be permitted against OCF before its due process rights have been violated? For example, if OCF's total sales are one billion dollars, its net profits are 100 million dollars while its assets are valued at three billion dollars, what amount of punitive damages, if any, violates its right to due process?

These questions are just a few of the many complexities raised by the Circuit Courts in rejecting the various arguments that multiple awards of punitive damages constitute a *per se* violation of a defendant's due process rights. *See, e.g., Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2nd Cir. 1990). Moreover, the argument that there is a fixed point where courts can affirmatively state that one's due process rights have been violated by the imposition of multiple awards is contrary to this Court's decisions in both *Haslip* and *TXO* where this Court stated:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that [a] general concern of reasonableness . . . properly enters into the constitutional calculus. 499 U.S., at 18.

As noted by the majority opinion enunciated in *TXO*:

> The parties' desire to formulate a "test" for determining whether a particular punitive award is "grossly excessive" is understandable. . . .
>
> Still, it is not correct to assume that the safeguards in the legislative process have no counterpart in the judicial process. The members of the jury were determined to be impartial before they were allowed to sit, their assessment of damages was the product of collective deliberation based on evidence and the arguments of adversaries, their award was reviewed and upheld by the trial judge who also heard the testimony, and it was affirmed by a unanimous decision of the State Supreme Court of Appeals. Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable, *see Haslip*, 499 U.S., at 24-40.

This Court's analysis in *TXO* of how the judicial system should address the issue of due process by assuring the proper procedural safeguards exist so that a fair trial is given is the prevailing judicial answer to the question of due process as it relates to multiple punitive damages. At the very least, there should be a full ventilation by the lower courts of the principals enunciated in *TXO* before this Court should consider granting certiorari on the issues raised by OCF as the lower courts will probably not have difficulty in applying these principles.[9]

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[9] Indeed, this Court denied certiorari in a case that had been held in abeyance while *TXO* was being considered which

While this case by case approach may be contrary to OCF's preference for a final resolution of this issue, it is the only consistent approach that can be taken in this area where "reasonableness" is a measuring stick for due process.

Two further comments are in order. First, the issues raised by OCF are more appropriate for resolution by the legislative branch than the judicial forum. As noted by the Third Circuit:

> We do not disagree with the concerns that have been expressed about punitive damages awards, particularly in the asbestos cases. We differ instead with those who would have the judiciary resolve the conflicting policy arguments. We refrain from adopting such an activist role on what is essentially a policy matter, and believe that insofar as OCF would have us enunciate a prohibition of successive claims of punitive damages in mass tort litigation as a matter of Virgin Islands law, that decision is best left to the United States Congress or the legislature of the Virgin Islands. (App. at 29a).

Second, contrary to the notion advanced by OCF that it is facing skyrocketing punitive damage awards resulting in "overkill," the "underlying facts appear to be far

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raised these same issues. *Owens-Corning Fiberglas v. Adams*, 113 S. Ct. 3035, 125 L.Ed. 2d 722 (1993). With certiorari having been denied in *Adams* at the same time of the *TXO* decision, it would seem appropriate that at a minimum, the lower courts should be allowed time over the next several terms to ventilate the principals enunciated in *TXO* before considering whether it is necessary to hear these issues that have heretofore not been considered worthy of review by this Court.

from clear, despite high profile commentary" as noted by the Third Circuit. (App. at 31a). Indeed, as pointed out by the Third Circuit, OCF admits that the vast majority of asbestos claims that go to trial result in no verdict at all to the plaintiff. (App. at 31a). The Third Circuit also took note of one article the Court found to be quite thorough which concluded, after a review of numerous case studies, that punitive damage awards are relatively rare and are frequently reduced during the appellate process. *See Michael Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts 28 (Papers of the Roscoe Pound Found. 1991).* As noted by the Court in *Leonen v. Johns-Manville Corp.*, 717 F.Supp. 272 (D.N.J. 1989):

> Moreover, while the "overkill" argument is not entirely without merit, defendants have not proffered any factual documentation which would persuade the Court to reject the reasoning in *Fischer* that defendants' fears are more speculative than real. There is nothing before the court which indicated that any of the defendants in this case are facing bankruptcy or that bankruptcy, if it should occur, will result more from the punitive damages awarded than the countless awards for compensatory damages. *Id.* at 286.

Thus, it is clear that even if OCF had properly preserved the necessary factual record to raise the multiple award/due process argument, there is no legal basis for granting certiorari in this case as OCF received ample due process in the proceedings below and the due process concerns of other defendants facing such multiple

awards can be appropriately resolved in the future by similar judicial treatment.

CONCLUSION

OCF failed to properly preserve the factual record to support even a realistic consideration of the constitutional issues that it raises in its Petition. Like the Third Circuit, this Court cannot be transformed into a fact-finding body in cases involving punitive damages where the evidence is never proffered for consideration by the jury or subjected to the rigors of pre-trial discovery. Such questions should be "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process . . . to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Finally, the verdict in this case was subjected to the appropriate constitutional safeguards, insuring that OCF's right to due process was not violated. Additionally, judicial process can effectively address such due process concerns on a case by case basis whenever multiple awards of punitive damages might be imposed.

For the foregoing reasons, OCF's petition for certiorari should be denied.

Respectfully submitted,

JOEL H. HOLT
(Counsel of Record)
2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-8709

PAUL S. MINOR
MINOR & GUISE
310 Main Street
P.O. Drawer 1388
Biloxi, MS 39533

Counsel for Respondent
William Dunn

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No. 93-658

In The

Supreme Court of the United States

October Term, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

v.

WILLIAM DUNN,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S OPPOSITION TO MOTION BY CENTER FOR CLAIMS RESOLUTION TO FILE AN AMICUS CURIAE BRIEF

JOEL H. HOLT
2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-8709

PAUL S. MINOR, ESQ.
MINOR & GUICE
160 Main Street
P.O. Drawer 1388
Biloxi, MS 39533

Counsel for Respondent
William Dunn

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONDENT'S OPPOSITION TO MOTION BY CENTER FOR CLAIMS RESOLUTION TO FILE AN AMICUS BRIEF

The Center for Claims Resolution (the "Center") should not be permitted to file an amicus brief for two reasons. First, it was an active participant as a defendant at the trial level in this case, yet it never raised the issues before the trial court that it now requests this Court to address. Second, the Center settled its dispute with the Respondent prior to trial and affirmatively agreed to cease all active participation in this litigation at the time of settlement. As such, its request to intervene in this matter is contrary to its own prior involvement in this case and is directly in violation of its settlement agreement.

Respectfully submitted,

JOEL H. HOLT
(Counsel of Record)
2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820
(809) 773-8709

PAUL S. MINOR
MINOR & GUICE
160 Main Street
P.O. Drawer 1388
Biloxi, MS 39533

Counsel for Respondent
William Dunn

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No. 93-658

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

WILLIAM DUNN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

DONALD FRANCIS DONOVAN
Counsel of Record
ANNE E. COHEN
JONATHAN E. RICHMAN
SANDRA L. COBDEN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000
Counsel for Petitioner Owens-Corning Fiberglas Corporation

November 24, 1993

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Respondent's ("plaintiff's") opposition to petitioner Owens-Corning Fiberglas Corporation's ("Owens-Corning's") petition misrepresents the record and ignores the real reasons why this Court's review is both necessary and appropriate. Owens-Corning has presented sufficient evidence to support its due-process arguments, and the Court should not wait until the asbestos litigation crisis becomes even worse before deciding to intervene.[1]

I.

The Record Suffices to Permit Review.

As the five *in banc* dissenters concluded, the record in this case more than suffices to preserve the important constitutional questions presented. [Pet. at 57a.] Contrary to plaintiff's claim, the district court record contains evidence of other punitive-damages awards against Owens-Corning: the company submitted a sworn affidavit and numerous exhibits (including copies of judgments, transcript excerpts and other public records) showing 11 other awards totalling $19,950,000 as of mid-1991. [JA 1940-2110; *see also* Pet. at 134a-140a (compiling awards).][2] Those judgments are public facts that a court may judicially notice, *see* Fed. R. Evid. 201, and the Third Circuit majority and dissenters discussed those other awards in their opinions [Pet. at 33a-34a, 57a].

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1. Owens-Corning will not respond to plaintiff's recitation [at 2-5] of the evidence allegedly supporting punitive damages, because the petition does not raise conduct-based issues.

2. This case thus is quite different from *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-81 (2d Cir.), *cert. dismissed*, 497 U.S. 1057 (1990), where the defendant could show only two prior awards totalling $375,000.

The district court record also contains information about Owens-Corning's total revenues from asbestos-containing Kaylo (approximately $140 million). [JA 2120; Pet. at 50a.] The record therefore establishes that Owens-Corning's projected $1 billion uninsured liability for claims through 1999 is approximately *seven times* the company's total Kaylo *sales* -- regardless of whether a reviewing court also considers that the uninsured liability is *125 to 700 times* the company's total Kaylo *profits* (approximately $1.4 to $7.7 million) [Pet. at 35a n.24].

Plaintiff's argument [at 6, 11] that Owens-Corning should have submitted evidence of other punitive-damages awards to the jury, rather than to the district court or the Third Circuit, ignores that such an approach,

> although valid in concept, is unrealistic in practice. It requires a defendant to advise the jury that prior juries hearing the same evidence have already found that the defendant's conduct was so egregious as to warrant punitive damages. To require a defendant to present such prejudicial evidence to a jury as its only alternative is to place it between Scylla and Charybdis.

Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1056, *vacated on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989); *accord Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967) ("unrealistic" to expect jury to deny or reduce punitive damages based on other awards, "even assuming the defendant would want such a charge, and still more unrealistic to expect that

the jury would follow such an instruction").[3] *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 22 (1991), itself upheld a punitive-damages scheme providing for *post*-verdict consideration of "the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." And "[f]ollowing the dictates of *Haslip*," the West Virginia Supreme Court revamped that state's punitive-damages law to require the trial court -- not the jury -- to consider "[a]ny other civil sanctions against the same defendant, based on the same conduct." *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897, 908-09 (1991).

Restricting a reviewing court's substantive due-process scrutiny to the information available at the time of trial also interferes with that court's ability to make an independent assessment of whether punitive damages are in fact still needed to punish and deter (and if so, in what amount). In mass-tort contexts such as the asbestos litigation, additional punitive-damages awards may be entered on a weekly or monthly basis. If the reviewing court may consider only what was (or could have been) presented to the jury, it never will be able to evaluate the overall situation.

This case illustrates the problem. When Owens-Corning filed its post-trial motions in mid-1991, 12 punitive-damages judgments (including this one) had been entered against it. As of now,

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3. The district court's bifurcation of the compensatory and punitive phases of the trial did not alleviate the problem, as plaintiff suggests [at 15 n.6]. Even if bifurcating the determinations of *liability* for punitive damages and *amount* of punitive damages might conceivably enable a defendant to inform a jury of other punitive-damages awards, merely bifurcating the compensatory-damages phase from the punitive-damages phase will not reduce the extreme prejudice noted in *Juzwin* and *Roginsky*.

there are at least 29 such judgments. [Pet. at 134a-140a.][4] If this Court cannot consider all 29 judgments in evaluating Owens-Corning's due-process arguments, that number might well be much higher by the time the Court reviews a certiorari petition from the 29th judgment. The time lag inherent in the appellate process thus ensures that the due-process violations will continue if the Court cannot assess the ongoing need for punitive damages based on the best available public information.

II.

Additional Punitive Damages Are Not Needed to Punish or Deter.

Plaintiff nowhere refutes Owens-Corning's *factual* showing about the scope and impact of the asbestos litigation. Instead, plaintiff claims [at 13] that Owens-Corning should not be "'relieved of liability for punitive damages merely because . . . [it] may have managed to seriously injure a large number of persons'" (quoting *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 437 N.E.2d 910, 913 (1982), *rev'd*, 98 Ill. 2d 324, 456 N.E.2d 131 (1983)). This argument misses the point. The number of persons allegedly affected by Owens-Corning's conduct is the very reason why the company's liability for *compensatory* damages is so enormous. Where, as here, those *compensatory* costs themselves are high enough to satisfy the goals of punishment and deterrence, additional

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4. Yet another judgment, for $1 million in punitive damages, recently was entered. *See $3 Million West Virginia Verdict*, Mealey's Litig. Reports - Asbestos 11 (Oct. 1, 1993). At least one other verdict, for $100,000, has not yet been reduced to judgment. *See $100,000 in Punitives Returned Against OCF*, *id.* at 12.

punitive damages are unnecessary and excessive -- and therefore violate due process.

Plaintiff's (and the Third Circuit majority's) focus on the fact that, *as of 1991*, Owens-Corning had not yet actually paid any punitive-damages *judgments* is too narrow: it unjustifiably ignores (*i*) the very substantial amounts of punitive damages on appeal or otherwise unresolved (currently more than $44 million) [Pet. at 17 n.10], (*ii*) the amounts in excess of compensatory damages that Owens-Corning was required to pay to *settle* judgments with punitive-damages components [JA 1945-48], (*iii*) the approximately $8.5 million in punitive damages that Owens-Corning has paid to date, including *judgments* of $5,380,000 paid in 1993 [Pet. at 17 n.10], and (*iv*) the need to consider prior *and* future punitive-damages awards, *see* Restatement (Second) of Torts § 908, comment e.

But most importantly, plaintiff and the Third Circuit majority ignore the approximately $1 billion in uninsured *compensatory* costs that Owens-Corning expects to pay for claims through 1999. Because this uninsured liability more than suffices to punish and deter, it cannot be eliminated from an analysis of how much punishment and deterrence already is being inflicted.

Plaintiff also misrepresents Owens-Corning's financial condition. Contrary to his claim [at 7], Owens-Corning's "current financial statements" do *not* say the asbestos litigation's "additional uninsured costs . . . will not have a materially adverse effect on the Company's financial position." The quoted statement is three years old. It comes from Owens-Corning's 1990 Annual Report [Pet. at 35a], which predated the company's decision to charge an additional $800 million against 1991 earnings to cover the *uninsured* costs of asbestos claims through 1999 [*id.* at 34a n.23]. (That $800

million charge, together with previous charges, created an unfunded reserve of $955 million to cover uninsured asbestos costs.)

Plaintiff's discussion of Owens-Corning's remaining insurance [at 7-8] is equally misleading. The cited $1.26 billion figure not only dates from *1990* but also includes as much as $230 million in deductibles. By the end of 1992, however, Owens-Corning had only about $675 million in unexhausted product-liability insurance (excluding deductibles), and only about $400 million of that amount had not yet been committed. [Pet. at 9.][5]

III.

This Court Should Act Now.

Plaintiff has not offered any legitimate reason for this Court to defer consideration of the issues raised in Owens-Corning's petition.

First, allowing the issues to "ventilate" [Opp. at 18] in light of *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), would not serve any purpose. *TXO* did not address the unique problems of mass-tort litigation (much less asbestos cases), and it is relevant here only to the extent it reaffirmed *Haslip*'s basic holding that the Due Process Clause imposes substan-

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5. Owens-Corning's most recent Form 10-Q Report, filed on November 15, 1993 with the Securities and Exchange Commission, states that the company had only about $431 million in unexhausted product-liability insurance as of September 30, 1993. The Form 10-Q also states that Owens-Corning received 11,200 new asbestos personal-injury claims in the third quarter of 1993.

tive limits on punitive damages.[6] Further "ventilation" is unnecessary.

Second, plaintiff's claim [at 1] that the Courts of Appeals have not reached conflicting decisions on the issues raised here not only overlooks numerous dissents and other expressions of misgivings *within* appellate courts; it also demonstrates why this Court's intervention is so necessary. As Owens-Corning showed in its petition, the lower courts have proven unable to deal with the problems posed by mass-tort claims pending in hundreds of federal and state forums throughout the country. The Third Circuit majority itself specifically declined to tackle these questions "in light of the Supreme Court's studied silence on the policy issue" [Pet. at 32a], and other courts have expressed similar reluctance or powerlessness, *see* Pet. at 25-29; *see also Cantrell v. GAF Corp.*, 999 F.2d 1007, 1019 (6th Cir. 1993) (Wellford, J., concurring) ("Were I writing on a clean slate in this court, I would adopt the language of then Chief Judge Charles Clark of the Fifth Circuit": "'The problems we face in this litigation are ones of national public policy. . . . Since Congress has not provided a solution, the Supreme Court of the United States should have been asked to provide one.'") (quoting *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 417 (5th Cir.) (*en banc*) (Clark, C.J., dissenting), *cert. denied*, 478 U.S. 1022 (1986)); *Edwards v. Armstrong World*

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6. The denial of certiorari in *Owens-Corning Fiberglas Corp. v. Adams*, 113 S. Ct. 3035 (1993), which had been held in abeyance pending disposition of *TXO*, thus has no particular meaning. Moreover, "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quotations omitted). In addition, no West Virginia appellate court had issued an opinion that could be reviewed in *Adams*. Here, in contrast, five members of the *in banc* Third Circuit dissented from the majority's ruling and agreed with Owens-Corning's due-process arguments.

Indus., Inc., 911 F.2d 1151, 1155 (5th Cir. 1990) (echoing prior "'misgivings' that no due process or legislative remedy is available in this circuit"). This Court is the only one that can exercise nationwide jurisdiction and resolve the issues on anything other than a parochial or piecemeal basis. The lower courts are waiting for guidance. They should not be forced to wait any longer.

Third, judicial rather than legislative action is entirely appropriate. This case involves due-process questions and common-law damages issues, which are the province of the judiciary. As the five *in banc* dissenters stated below, "[m]istakes created by courts can be corrected by courts without engaging in judicial activism." [Pet. at 53a; *see also id.* at 27.]

Fourth, the various questions that plaintiff poses [at 15-17] should not deter review. The facts of the asbestos litigation (and of Owens-Corning's own situation) are so extreme that they go well beyond whatever due-process line the Court might draw or whatever rule might evolve over time. As plaintiff himself concedes [at 17], the Court did not (or could not) draw any "fixed" or "bright" due-process lines in *Haslip* and *TXO*, but the Court nevertheless did not refuse to review the important and difficult constitutional issues concerning punitive damages. The Court should not shrink from the present task, either.

Finally, plaintiff nowhere addresses Owens-Corning's showing that continued awards of punitive damages in asbestos litigation impede settlement efforts, congest the courts and threaten to exhaust resources needed to compensate future asbestos plaintiffs for their injuries. The longer this Court waits to consider the practical and constitutional implications of multiple punitive-damages awards, the more serious these problems will become --

for asbestos litigants, the judiciary and society at large. As the five Third Circuit *in banc* dissenters concluded, the continued imposition of punitive damages in these circumstances "serves no rational purpose." [Pet. at 66a (Weis, J., dissenting); *accord id.* at 67a (Becker, J., dissenting) (additional punitive damages are "so irrational as to offend the due process clause").]

CONCLUSION

For the reasons stated in the petition and in this reply, the Court should grant Owens-Corning's petition for a writ of certiorari.

Respectfully submitted,

DONALD FRANCIS DONOVAN
(*Counsel of Record*)
ANNE E. COHEN
JONATHAN E. RICHMAN
SANDRA L. COBDEN
Debevoise & Plimpton
875 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for Petitioner
Owens-Corning Fiberglas Corporation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

v.

WILLIAM DUNN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION OF THE CENTER FOR CLAIMS RESOLUTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Of Counsel:
LAWRENCE FITZPATRICK
JOHN G. GAUL
CENTER FOR CLAIMS RESOLUTION
116-300 Village Boulevard
Princeton, NJ 08540
(609) 520-6800

November 24, 1993

JOHN D. ALDOCK
(Counsel of Record)
LAURA S. WERTHEIMER
JOHN E. VEILLEUX
SHEA & GARDNER
1800 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 828-2000
Attorneys for Amicus Curiae Center for Claims Resolution

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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Petitioner,

v.

WILLIAM DUNN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION OF THE CENTER FOR CLAIMS RESOLUTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONER

The Center For Claims Resolution (the "Center") moves for leave to file the attached brief as *amicus curiae* in support of the Petition for a Writ of Certiorari filed by Owens-Corning Fiberglas Corporation ("Owens-Corning"),

pursuant to Rule 37 of the Rules of the Supreme Court of the United States.[1]

The Center is a non-stock, not-for-profit corporation representing 20 companies that are defendants in asbestos personal injury litigation.[2] The Center was formed in October 1988 to deal with the unprecedented explosion in asbestos-related litigation. It represents its members in personal injury cases on a consolidated basis, thereby reducing litigation costs and facilitating settlement. The Center's goal is to resolve claims for fair value. Thus, to date the Center has resolved -- through settlement, dismissal, and, in some cases, trial -- approximately 135,000 personal injury claims.

As of the date of this brief, approximately 58,000 cases were pending against the Center's members, virtually all of which include claims for punitive damages. All of these suits seek to punish the same conduct, because each is predicated on allegations that the particular Center member knew of the potential hazards of asbestos but failed to warn of them. Awards of such damages in the past have helped drive other defendants into bankruptcy, thus placing an increasing liability share on remaining defendants. The threat of punitive damages in every case, moreover, greatly

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[1] Petitioner Owens-Corning Fiberglas has consented to the filing of this brief. Counsel for respondent William Dunn, Joel H. Holt, declined to consent.

[2] The companies in the Center are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp. (formerly National Gypsum Company); CertainTeed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Service Industries, Inc.; Nosroc Corp.; Pfizer, Inc.; Quigley Co. Inc.; Shook & Fletcher Insulation Co.; T&N plc; Union Carbide Chemicals and Plastic Company, Inc.; and United States Gypsum Co.

inflates the amounts plaintiffs seek in settlement, and makes settlement difficult or impossible in many cases. Accordingly, the Center has a fundamental interest in the question presented here, namely whether the Due Process Clause imposes a limitation on repetitive punitive damages awarded in multiple actions for a single wrongful course of conduct by one defendant.

In addition, the Center's nationwide litigation experience on behalf of numerous companies gives it a perspective on the punitive damages issue that may prove useful to this Court. Last, the Center presents arguments supplementary to those advanced by petitioner Owens-Corning. In particular, the Center's brief describes the growing use of multipliers to assess punitive damages in mass tort litigation and explains how the use of punitive damages multipliers in consolidated cases can readily lead to potentially enormous awards of punitive damages that can cripple, if not destroy, the targeted defendant.

In sum, the Center has a vital and significant stake in the question presented here and the extent and diversity of

its experience may be of assistance to the Court. Accordingly, we respectfully request this Court to grant this motion for leave to file the attached brief.

Respectfully submitted,

Of Counsel:
LAWRENCE FITZPATRICK
JOHN G. GAUL
CENTER FOR CLAIMS RESOLUTION
116-300 Village Boulevard
Princeton, NJ 08540
(609) 520-6800

November 24, 1993

JOHN D. ALDOCK
(Counsel of Record)
LAURA S. WERTHEIMER
JOHN E. VEILLEUX
SHEA & GARDNER
1800 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 828-2000
Attorneys for Amicus Curiae Center for Claims Resolution

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE CENTER FOR CLAIMS RESOLUTION AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

The Center for Claims Resolution (the "Center") is a non-stock, not-for-profit corporation representing 20 companies that are defendants in asbestos personal injury litigation.[1] The Center was formed in October 1988 to deal

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[1] The companies in the Center are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims (continued...)

with the unprecedented explosion in asbestos-related litigation. It represents its members in personal injury cases on a consolidated basis, thereby reducing litigation costs and facilitating settlement. The Center's goal is to resolve claims for fair value. Thus, to date the Center has resolved -- through settlement, dismissal, and, in some cases, trial -- approximately 135,000 personal injury claims.

As of the date of this brief, approximately 58,000 cases were pending against the Center's members, virtually all of which include claims for punitive damages. In essence, each punitive damages claim made against a Center member seeks to punish it for the same conduct, because each claim is predicated on allegations that the particular Center member knew of the potential harms of asbestos but failed to warn of them. The Center expects that almost all future litigation against its members will likewise seek punitive damages. Awards of such damages in the past have helped drive other asbestos defendants into bankruptcy, thus placing an increasing liability share on remaining defendants. The threat of punitive damages in every case, moreover, greatly inflates the amounts plaintiffs seek in settlement, and makes settlement difficult or impossible in many cases. For these reasons, the Center has a vital interest in the question presented here, namely whether the Due Process Clause imposes a limitation on repetitive punitive damages awarded in multiple actions for a single wrongful course of conduct by one defendant. Moreover, the Center's nationwide litigation

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[1] (...continued)
Management Corp. (formerly National Gypsum Company); CertainTeed Corp.; C.E. Thurston and Sons, Inc.; Dana Corp.; Ferodo America, Inc. (formerly Nuturn Corp.); Flexitallic, Inc.; GAF Corp.; I.U. North America, Inc.; Maremont Corp.; National Service Industries, Inc.; Nosroc Corp.; Pfizer, Inc.; Quigley Co. Inc.; Shook & Fletcher Insulation Co.; T&N plc; Union Carbide Chemicals and Plastic Company, Inc.; and United States Gypsum Co.

experience on behalf of many defendants gives it a perspective on this punitive damages issue that may prove useful to the Court.[2]

SUMMARY OF ARGUMENT

This Court has recognized that the Due Process clause imposes substantive limitations "beyond which penalties may not go." *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718 (1993) (plurality opinion) (citation omitted). In prior cases, this Court has reviewed whether the amount of punitive damages awarded to one claimant, who was the sole victim of defendant's wrongful conduct, was reasonable. This petition presents a wholly different question: whether multiple awards of punitive damages in mass tort litigation against one defendant for the same course of conduct violate the Due Process Clause of the Fourteenth Amendment.

The excessiveness of multiple punitive damages awards is of particular concern in mass tort litigation. This litigation is the result of a national market for mass-produced products. Whenever a product distributed nationwide is found to have injured some users, the likely result is thousands of products liability actions brought in state and federal forums by users allegedly harmed by the product, seeking compensatory and punitive damages against the defendant manufacturer of the product for its negligent design and/or manufacture of that product. Traditional procedures for reviewing the rationality of a punitive damages award have proven wholly insufficient to protect

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[2] Petitioner Owens-Corning Fiberglas has consented to the filing of this brief. Because counsel for respondent refused to consent, the Center submits herewith a motion for leave to file this *amicus* brief in support of petitioner.

defendants in mass tort litigation from multiple punitive damages awards which far exceed the amount needed to punish and deter the conduct found to be harmful.

Although lower courts have recognized the serious due process concerns raised by multiple awards of punitive damages in mass tort litigation nationwide, none of these courts have attempted to resolve this problem. This Court should take this opportunity to address this issue and provide the lower courts with a framework for evaluating whether multiple punitive damages awards punish a defendant repeatedly and without limitation for a single course of conduct in violation of the Due Process clause.

ARGUMENT

I. THE DUE PROCESS STANDARD FOR DETERMINING EXCESSIVENESS SHOULD INCLUDE CONSIDERATION OF ANY PRIOR PUNITIVE DAMAGES ASSESSED AGAINST A DEFENDANT FOR THE SAME CONDUCT

This Court has instructed that punitive damages serve a twofold purpose -- to punish and deter a particular course of wrongful conduct. *E.g.*, *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 22 (1991); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Punitive damages are a "windfall to a fully compensated plaintiff" and are, by design, not intended to compensate the plaintiff. *E.g.*, *Newport* 453 U.S. at 267; *IBEW* v. *Foust*, 442 U.S. 42, 50 (1979).

This Court has recently confirmed that punitive damages must be "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 21. This Court has made clear that punitive awards may violate substantive due

process if the punitive damages assessed are excessive. See *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718-19 (1993) (plurality opinion); *id.* at 2731 (O'Connor, J., dissenting).

In *Haslip* and in *TXO*, where the defendant's wrongful conduct affected only the plaintiff, this Court assessed whether the ratio of punitive damages to compensatory damages in the individual action was constitutionally permissible. This petition raises a different question: whether repetitive punitive damages awarded against the same defendant for the same conduct are grossly excessive and thus unconstitutional. This question arises with frequency in increasingly prevalent mass tort litigation where thousands of claimants bring suit against a small number of defendant manufacturers seeking compensatory and punitive damages on the grounds that the defendant manufacturers negligently designed and/or manufactured a product and/or failed to warn of its hazards. In this context, the punitive damages awarded in a given case may bear a reasonable relationship to the compensatory damages in that case but, when aggregated with punitive damages awarded in other cases for the same conduct, may not be rationally related to the constitutionally permissible goals of punishment and deterrence.

For some time, lower courts have recognized that multiple punitive damages awards in the mass tort context could present excessiveness problems, but none have attempted to tackle this issue.[3] As we show below, repeated and excessive punitive damages awards are a looming threat to defendants involved in mass tort litigation. This Court should grant certiorari to establish substantive due process limitations on the aggregate amount of punitive damages that can be awarded in mass tort litigation.

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[3] See cases cited at note 23, *infra*.

A. Mass Tort Litigation Presents Unique Problems

Because of our national market, mass-produced goods are distributed to millions of users. An allegedly defective product often leads numerous users to bring suit against the product manufacturer seeking compensatory and punitive damages for allegedly defective design and/or manufacture of the product. When liability is found, each jury often awards damages to an individual plaintiff in a vacuum. In most cases, it has no knowledge of any prior compensatory and/or punitive damages that may already have been awarded against the defendant for the same conduct, much less the aggregate amount of such awards. Thus, multiple individual claims for punitive damages create a significant potential for aggregate punitive awards against a defendant for the same act or conduct far in excess of the amount reasonably necessary to punish or deter the offending act or conduct.[4]

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[4] See, *e.g.*, *Asbestos Litigation Crisis in Federal and State Courts: Oversight Hearing Before the Subcomm. on Intellectual Property and Judicial Admin. of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) [hereinafter *Hearing*] (statement of Hon. William W. Schwarzer, at 17); Report of the [U.S.] Judicial Conference Ad Hoc Committee on Asbestos Litigation, at 32-33 (Mar. 1991) [hereinafter Judicial Conference Report]; Dennis N. Jones *et al.*, *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 Ala. L. Rev. 1, 1-2 (1991) [hereinafter Jones *et al.*]; Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice, American College of Trial Lawyers, at 20-26 (Mar. 3, 1989); John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147 (1986); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37 (1983); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 50 (1982).

Asbestos products liability litigation is, of course, the leading example of mass tort litigation. By June 30, 1991, over 71,000 cases had been filed nationwide in the federal courts against various asbestos miners and product manufacturers.[5] Soon thereafter, the Judicial Panel on Multidistrict Litigation transferred the approximately 26,000 then-pending asbestos actions to the Eastern District of Pennsylvania for coordinated or consolidated pre-trial proceedings.[6] Since then, the total of cases transferred to the multidistrict proceeding has risen to nearly 40,000.[7] Moreover, state courts are likewise burdened by the onslaught of asbestos litigation -- at least 70,000, and perhaps as many as 129,000, asbestos cases were pending in various state courts as of mid-1992.[8] New claims continue to be filed nationwide against Center members alone at a rate of approximately 2,000 per month.

These claims all seek to punish the same alleged misconduct -- that the defendants allegedly knew or should have known of a possible link between asbestos and health hazards, but did not warn users of such dangers. In the asbestos litigation as a whole, as with petitioner Owens-Corning in particular, the aggregate compensatory damages awarded to a multitude of claimants punish the defendant for its wrongful conduct. *Cf. Smith* v. *Wade*, 461 U.S. 30, 94

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[5] *Hearing*, *supra* note 4 (statement of Hon. William W. Schwarzer, at 36).

[6] *In re Asbestos Prods. Liab. Litig. (No. VI) (MDL No. 875)*, 771 F. Supp. 415 (J.P.M.L. 1991).

[7] Asbestos Litigation Reporter (Andrews) (Sept. 17, 1993) at 28,328.

[8] State Judges Asbestos Litigation Committee, *Megatorts: The Lessons of Asbestos Litigation*, at 1 (July 21, 1992), *reprinted in* Mealey's Litig. Rep. -- Asbestos (Nov. 20, 1992) at B-1.

(1983) (O'Connor, J., dissenting). Nevertheless, multiple punitive damages totalling millions of dollars have been assessed repeatedly against a number of defendants as punishment for alleged misconduct with respect to asbestos warnings.

The excessiveness of these multiple punitive damages awards is quite apparent in the asbestos context because these damages are imposed decades after the allegedly wrongful conduct was stopped, on officers who did not participate in such conduct and shareholders who did not benefit from it. Moreover, the combined size of such punitive awards,[9] when added to the millions of dollars of

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[9] A brief review of published data shows that, even as early as 1982, punitive damages awards in asbestos cases had become staggering. A survey published in Asbestos Litigation Reporter (Andrews) that was included in an appendix to the opinion in *Jackson* v. *Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985), showed that, by the end of 1982, in trials of 147 asbestos cases, a total of $39.47 million in punitive damages had been awarded to 21 plaintiffs. *Id.* at 1338 & n.37. Similarly, at the time it filed for Chapter 11 reorganization in 1982, the Manville Corporation reported that ten punitive damages verdicts had been returned against it, averaging $616,000 each, for a total of $6.16 million. *Id.* at 1339 & n.40. In addition, a study by the Rand Corporation in 1984 reported that, in the period from January 1, 1980 through August 26, 1982, 19 plaintiffs received a total of $4.93 million in punitive damages awards. *Id.* at 1338-39.

In more recent years, punitive damages awards have grown even higher. For example, in November 1987, six Delaware plaintiffs were awarded $75 million in punitive damages against asbestos defendant Raymark Industries, Inc., which shortly thereafter went into bankruptcy. *George* v. *AC&S, Inc.*, No. 82C-MR71 (Del. Super. Ct., New Castle County, Nov. 9, 1987), *reported in* Asbestos Litig. Rep. (Andrews) (Nov. 20, 1987) at 16,100. Further, in 1990, shortly before filing for bankruptcy protection, the Celotex Corporation stated in affidavits that, between September 1988 and March 1989, over $10 million had been awarded against it for punitive damages, compared to $15 million in judgments for compensatory damages during the same period. *Edwards* v. *Armstrong World Indus., Inc.*, 911 F.2d 1151, 1155 (5th Cir. 1990).

compensatory damages awards, may far exceed the total profits earned by asbestos producers from sales of their allegedly defective asbestos-containing products. Such is the experience of petitioner in the instant case.[10] Indeed, the magnitude of these awards has helped to drive many asbestos producers into bankruptcy,[11] threatening to deprive future plaintiffs of compensatory damages.[12] Present claimants who have been fully compensated for their injuries should not be permitted to receive windfall punitive damages at the expense of future claimants who may then be pre-

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[10] In this case, the total sales by petitioner Owens-Corning of its asbestos product Kaylo amounted to approximately $140 million, and its profits did not exceed $7.7 million. To date, Owens-Corning has resolved more that 101,000 asbestos personal injury claims (for more than $1 billion in indemnity costs) and it expects to pay $1 billion of its own funds to cover the uninsured costs of pending and future asbestos personal injury claims through 1999. Owens-Corning Petition for a Writ of Certiorari at 16-17. Thus, petitioner's uninsured liability dwarfs the modest profits it earned from sales of its asbestos product. On top of this, $56 million in punitive damages have been awarded against Owens-Corning -- more than seven times its total profit on Kaylo.

[11] Since the commencement of this litigation in the mid-1970s, at least fifteen asbestos manufacturers have filed for protection under the U.S. bankruptcy laws, including Amatex, Brunswick Fabricators, Carey-Canada, Celotex, Eagle-Picher Industries, Forty-Eight Insulations, H.K. Porter, Hillsborough, Manville, Nicolet, North America Asbestos, Pacor, Raymark Industries, Standard Insulation and Unarco (as well as its parent company UNR Industries). Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 390 & n.13 (1993).

[12] Lower courts have recognized the real danger that the assets of asbestos defendants will be exhausted by multiple punitive damages awards and these defendants will be unable to pay compensatory damages to future claimants for their asbestos-related injuries. See *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 751 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *on rehearing*, 993 F.2d 7 (2d Cir. 1993); *Abate* v. *ACandS, Inc.*, No. 89236704, slip. op. at 23-25 (Md. Cir. Ct., Baltimore City, Dec. 9, 1992), *reprinted in* Asbestos Litig. Rep. (Andrews) (Dec. 18, 1992) at 26650, 26661-62.

cluded from obtaining compensation for their injuries. These multiple awards are overkill and cannot be justified on either punishment or deterrence grounds.

An example of the gross excessiveness of multiple punitive damages awards can be seen in asbestos cases where punitive damages are assessed by a "multiplier" method. *E.g.*, *Cimino* v. *Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990). Under this approach, punitive damages are tried in "common issue," consolidated trials involving hundreds or possibly thousands of claimants, with the jury determining a punitive damages "multiplier" for each defendant. Then, once compensatory damages are assessed as to each individual claimant, the punitive damages awarded to that claimant are calculated by multiplying the defendant's share of the claimant's compensatory award by the punitive damages "multiplier." The use of punitive damages multipliers in consolidated cases, such as *Cimino*, can readily lead to awards of punitive damages totaling hundreds of millions of dollars.[13] And *Cimino* is not the

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[13] *Cimino* included a consolidated trial of the defendants' punitive damages liability to 2,298 plaintiffs. 751 F. Supp. at 657-58. Two of the original four defendants (Celotex and Carey-Canada) have filed for bankruptcy and a third (Fibreboard) has settled. See Asbestos Litig. Rep. (Andrews) (Oct. 16, 1992) at 26,227. The remaining defendant, Pittsburg-Corning, was assessed a punitive damages multiplier of 3.0. 751 F. Supp. at 657-58. If one assumes hypothetically that this company has a 10% share of compensatory damages (751 F. Supp. at 654, *as modified*, Memorandum Opinion and Order Granting In Part Pittsburg Corning Corporation's Motion to Modify Judgments of March 9, 1993, *reprinted in* Mealey's Litig. Rep. -- Asbestos (Apr. 2, 1993) at B-1), and the average punitive damages award against Pittsburg-Corning is $500,000 (which is less than the average awarded by the *Cimino* jury in 160 sample cases, see Order of Nov. 12, 1990, *Cimino* v. *Raymark Indus., Inc.*, No. B-86-0456-CA (E.D. Tex. Nov. 12, 1990), *reprinted in* Asbestos Litig. Rep. (Andrews) (Nov. 16, 1990) at 22,039-48), then the average punitive damages award against Pittsburg-Corning would be $150,000 in each case ($500,000 x 10% x 3). Totaled over 2,298

(continued...)

only litigation where such punitive damage multipliers have been awarded in consolidated trials of hundreds or thousands of claims.[14] Few, if any, companies could survive

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[13] (...continued)
cases, the multiplier might lead to aggregate punitive damages in excess of $344 million assessed against only one defendant in this one consolidated trial in one jurisdiction.

[14] In Mississippi, in the largest consolidated asbestos trial to date involving 9,600 plaintiffs, the Jackson County Circuit Court held a two-stage "common" issues trial for six sample plaintiffs which concluded in awards totalling $9.2 million in compensatory damages against three defendants, and a punitive multiplier of .10 against each defendant. The multiplier will be applied to all of the remaining cases consolidated before the Jackson County Circuit Court, estimated to be between 6,900 and nearly 10,000. *In re Asbestos Personal Injury Cases; Abrams et al.*, Nos. 88-5422(2), *et al.*, (Jackson County Cir. Ct., Miss.), *reported in* Asbestos Litig. Rep. (Andrews) (Aug. 20, 1993) at 28,112-13. For the six plaintiffs for whom compensatory damages have already been awarded, the .10 multiplier will generate additional punitive damages awards totalling $926,000 against the three liable defendants.

In Maryland, a Circuit Court consolidated over 8,500 cases from across the state and held a "common" issues trial resulting in the award of punitive damages multipliers ranging from .35 to 2.5 against several defendants. In the first six "sample" cases tried, compensatory damages totalling $9.6 million were awarded against six defendants while four defendants were hit with more than $7.2 million in punitive damages. Order Entering Final Judgments, *Abate* v. *ACandS, Inc.*, No. 89236704 (Md. Cir. Ct., Baltimore City, Dec. 9, 1992) at 10-11, 13-17, *reprinted in* Asbestos Litig. Rep. (Andrews) (Dec. 18, 1992) at 26,650, 26,655, 26,656-58. As discussed in note 22 *infra*, the court in this action, however, has deferred entering the judgments for punitive damages.

In West Virginia, the Kanawha County Circuit Court in 1989 held a consolidated trial in which punitive damages against three defendants were awarded to 315 claimants by a punitive mutiplier of 3. *In re Asbestos Cases*, No. 84-C-3321 *et al.* (W. Va. Cir. Ct., Kanawha County, May 26, 1989), *reported in* Asbestos Litig. Rep. (Andrews) (June 2, 1989) at 19,093. Since then, other West Virginia courts have ordered similar consolidated trials in (continued...)

even one award of punitive damages totaling hundreds of millions of dollars, much less multiple awards in multiple jurisdictions.

The imposition of punitive damages based on even a seemingly modest multiplier of compensatory damages can thus lead, in the mass tort context, to multiple punitive damages awards against a defendant for the same course of conduct that, in the aggregate, are unquestionably excessive. And these mass-consolidated cases represent a small fraction of the asbestos personal injury cases pending nationwide in which a typical asbestos defendant would be participating.

The asbestos products liability litigation is not unique. Mass tort litigation has arisen over many products distributed nationwide. Examples include litigation involving silicone gel breast implants;[15] DES, a prescription drug

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[14] (...continued)
which the jury would be asked to determine punitive damages multipliers. For example, such a consolidation was ordered of 533 claims in *In re Asbestos Cases (Individuals)*, Civil Action Nos.: All Pending Cases (W.Va. Cir. Ct., Monongahela County, Sept. 13, 1991). These cases settled, however, after the West Virginia Supreme Court of Appeals denied a writ of prohibition filed on behalf of the Center's members.

[15] A 1992 report estimated that two million women have received breast implants. See Stephen Lichtenstein, *A Discussion of the Silicone Gel-Filled Breast Implant Controversy*, 12 Rev. Litig. 205, 206 (1992). The major manufacturers of breast implants have proposed to settle all present and future claims of women who received their implants. However, no global settlement has yet been reached, and, if such a class action settlement is reached, claimants will still be permitted to opt-out of it. David R. Olmos, "Settlement Talks Falter in Breast Implant Case," *Los Angeles Times* (Nov. 15, 1993) at D2.

prescribed to prevent miscarriages;[16] lead-based paint;[17] and repetitive stress injuries.[18] The numerous claims filed with respect to each product generally allege that it was defective in design or that there was a failure to warn, and it appears that most actions have sought punitive damages as well as compensatory damages. As with asbestos product liability litigation, there is a virtual certainty in the mass tort setting that the punitive damages sought by thousands of claimants against the product manufacturer will punish that

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[16] Approximately 1,000 suits were filed against the manufacturers by women who took the drug and children who were affected by it. Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 920 (1989) [hereinafter Wheeler]. Recently, grandchildren of women who took DES have begun filing suit, creating the potential for a new wave of litigation. John B. Maynard, Note, *Third-Generation-DES Claims*, 27 New Eng. L. Rev. 241, 241-42 (1992).

[17] Class actions and individual suits have increased in recent years against the eight manufacturers who produced virtually all of the lead pigment used in paint in the U.S., spurring comparisons to mass asbestos litigation. Julie Gannon Shoop, *Class Actions Add Momentum to Lead Paint Litigation*, 28 Trial 11, 12, 14 (Apr. 1992). New York State officials have expressed concern that the number of products liability actions involving exposure to lead paint is mushrooming and that these actions are fast replacing asbestos as the "toxic tort (lawsuit) king." Matt Gryta, "2 Area Families Sue for $26 Million over Lead-based Paint; 8 Companies, Trade Group Named," *The Buffalo News* (Nov. 9, 1993).

[18] It has been estimated that 14 to 18 million American workers suffer repetitive stress injuries every year. Thus far, over 450 claimants have filed suit nationwide. More than 160 of these actions have been consolidated in the Eastern District of New York. Attorneys seeking to consolidate the remaining cases in the Eastern District of New York have stated their intention to file another 1,500 cases. This litigation "explosion" has been compared to that which hit the asbestos industry in the late 1970s and 1980s. Lawrence Chesler, *Repetitive Motion Injury and Cumulative Trauma Disorder: The Wave of Products Liability Arrives*, 10 Computer Lawyer 21, 24-25 (May 1993).

defendant repeatedly and without limitation for the same course of conduct.

In this case, the substantial compensatory and punitive damages assessed against petitioner Owens-Corning in numerous other cases have been fully adequate to serve the goals of punishment and deterrence. This Court should grant certiorari here to consider whether the award of additional punitive damages against petitioner Owens-Corning violates the Due Process Clause because such damages are no longer needed to further these goals.

B. This Court Should Grant the Petition to Consider Adoption of an Excessiveness Standard That Limits Multiple Punitive Awards for the Same Conduct

As we have shown, a seemingly reasonable relationship between the punitive damages and the compensatory damages awarded in a single case provides no basis for determining in the mass tort context whether a defendant has been punished repeatedly and unfairly for the same course of conduct. Absent limitation, multiple awards of punitive damages against a single defendant in the mass tort setting offend the requirement of fundamental fairness imposed by the Due Process Clause.

At present, there is no mechanism to control the aggregate level of multiple punitive damages awards. In each individual case, a jury awards punitive damages against a defendant for its wrongful conduct that affected an entire class of injured parties without sufficient knowledge of prior

punitive awards imposed to punish the same conduct.[19] The punitive damages award in even one of these actions might well constitute a sufficient punishment and deterrent for the conduct that gave rise to all of the litigation.[20]

The aggregation of multiple punitive awards in separate actions involving the same conduct results "in windfall awards to individual plaintiffs at the expense of a disproportionately punished defendant."[21] Further, multiple awards of punitive damages to plaintiffs involved in mass tort litigation jeopardize the defendant's ability to pay compensatory damages for future plaintiffs and eventually may cause the defendant to go into bankruptcy, injuring

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[19] It is no answer to suggest that the jury should be instructed on the amounts of prior punitive damages awards. Any such instruction is more likely to prejudice than to protect a defendant. See *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. 1053, 1056 & n.1, *modified*, 718 F. Supp. 1233 (D.N.J. 1989). See also Jones *et al.*, *supra* note 4, at 29-30 ("if presented to a jury, evidence of prior awards imposed for the same conduct could do the defendant more harm than good").

[20] Indeed, the recent use of a multiplier to set punitive damages in asbestos cases raises substantial due process concerns because the jury determining the multiplier cannot ascertain the size of the ultimate punitive damages award for all claimants in the consolidated proceeding or the impact that the total amount of the award will have on the defendant. Use of a multiplier does not allow for the "meaningful individualized assessment of appropriate deterrence and retribution," *Haslip*, 499 U.S. at 20, necessary to satisfy due process.

[21] *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 889 (N.D. Cal. 1981), *rev'd on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

shareholders, employees, customers, and creditors who had no part in or knowledge of the wrongful conduct.[22]

The lower courts that have considered this issue have recognized the substantial due process concerns associated with unlimited multiple punitive damages awards against a defendant for the same course of conduct.[23] However,

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[22] The Director of the Federal Judicial Center, Judge William W. Schwarzer, recently observed:

> "Punitive damages compete with compensatory damages for the increasingly scarce resources of asbestos defendants and their insurers. Until the claims of future claimants become liquidated, distribution of punitive damages to current claimants creates a risk of exhausting funds before potential claimants discover their injuries."

Hearing, *supra* note 4 (statement of Hon. William W. Schwarzer, at 13).

Similarly, the Judicial Conference Report, *supra* note 4, at 32, stated: "[M]ultiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants."

The risk of "asset depletion" led Judge Marshall A. Levin of the Maryland Circuit Court of Baltimore City to defer payment of any punitive damages award until all approximately 8,500 plaintiffs in the Baltimore City asbestos litigation received their compensatory awards. *Abate* v. *ACandS, Inc.*, *supra* note 14.

[23] See, *e.g.*, *King* v. *Armstrong World Indus., Inc.*, 906 F.2d 1022, 1032-33 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2236 (1991); *McBride* v. *General Motors Corp.*, 737 F. Supp. 1563, 1570 (M.D. Ga. 1990); *Johnson* v. *Celotex Corp.*, 899 F.2d 1281, 1287-88 (2d Cir.), *cert denied*, 111 S. Ct. 297 (1990); *Racich* v. *Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); *In re School Asbestos Litig.*, 789 F.2d 996, 1004-05 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986); *Juzwin* v. *Amtorg Trading Corp.*, 705 F. Supp. at 1060-64, *modified*,

(continued...)

most of these courts have avoided confronting this issue. Some have disposed of the case on narrow technical grounds.[24] Others have recognized that their limited powers preclude them from adopting a national, unified approach to the question of repetitive punitive damages in mass tort litigation.[25] Moreover, the absence of an accepted due process standard makes it more difficult for any individual court to restrain punitive damages simply because other courts have already awarded them.[26] This Court is not constrained by these jurisdictional limitations, and should grant certiorari to adopt a standard for determining whether repetitive punitive damages awarded against one defendant for a single course of conduct in mass tort litigation nationwide are excessive.

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[23] (...continued)
718 F. Supp. at 1234-36; *Leonen* v. *Johns-Manville Corp.*, 717 F. Supp. 272, 282-83 (D.N.J. 1989); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 862 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. at 899. See also *United States Mineral Prods. Co.* v. *Waters*, 610 So. 2d 20, 23 (Fla. Dist. Ct. App. 1992), where a panel of the Florida District Court of Appeals *sua sponte* certified to the Florida Supreme Court the issue of whether multiple punitive damages awards for a single course of conduct are permissible, describing the issue as "of great public importance."

[24] See, *e.g.*, *Johnson* v. *Celotex Corp.*, 899 F.2d at 1287-88 (inadequate record); *Racich* v. *Celotex Corp.*, 887 F.2d at 398 (same).

[25] See, *e.g.*, *King* v. *Armstrong World Indus., Inc.*, 906 F.2d at 1033; *Juzwin* v. *Amtorg Trading Corp.*, 718 F. Supp. at 1235.

[26] See *Dunn* v. *HOVIC*, 1 F.3d 1371, 1387 (3d Cir. 1993), *petition for cert. filed* (U.S. Oct. 25, 1993); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d at 840.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari, and in this *amicus* brief, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Of Counsel:
LAWRENCE FITZPATRICK
JOHN G. GAUL
CENTER FOR CLAIMS RESOLUTION
116-300 Village Boulevard
Princeton, NJ 08540
(609) 520-6800

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JOHN D. ALDOCK
(Counsel of Record)
LAURA S. WERTHEIMER
JOHN E. VEILLEUX
SHEA & GARDNER
1800 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 828-2000
Attorneys for Amicus Curiae Center for Claims Resolution